

APPELLATE COURT NO. 71595

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AT AUSTIN

RICK ALLAN RHOADES,

Appellant

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM 179TH DISTRICT COURT OF HARRIS COUNTY,
TEXAS

Judge J. Michael Wilkinson Presiding

STATEMENT OF FACTS

VOLUME 16 OF 40 VOLUMES

Marlene Swope
Official Court Reporter
301 San Jacinto
Houston, Texas 77002

FILED IN
COURT OF CRIMINAL APPEALS

MAR 5 1993

Thomas Lowe, Clerk

1923

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX	
VOLUME XVI	
GENERAL VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS	
BY THE COURT	<u>Page</u> 1925
BY THE STATE	1969
BY THE DEFENSE	2019

1 CAUSE NO. 612408

2 STATE OF TEXAS IN THE 179TH DISTRICT COURT
3 VS. OF

4 RICK ALLAN RHOADES HARRIS COUNTY, T E X A S
5

6 A P P E A R A N C E S:

7 For the State: Ms. Carol Davies
8 Assistant District Attorney
Harris County, Texas

9 For the Defendant: Mr. James Stafford
10 Ms. Deborah Kaiser
11 Attorneys at Law
Houston, Texas
12

13 BE IT REMEMBERED that upon this the
14 17th day of August A.D. 1992, the above entitled
15 and numbered cause came on for continued voir
16 dire of prospective jurors before the Honorable
17 J. Michael Wilkinson, Judge of the 179th
18 District Court of Harris County, Texas; and the
19 State appearing by counsel and the Defendant
20 appearing in person and by counsel, the
21 following proceedings were had, viz:
22
23
24
25

1 (A panel of prospective jurors is
2 seated in the courtroom).

3 THE COURT: All right, welcome back,
4 ladies and gentlemen. This is an annex court
5 for the 179th. As I briefly told you before we
6 recessed for lunch, we are in the process of
7 selecting a jury in a capital murder case. By
8 way of introduction of the principals, the
9 defendant in this case is Mr. Rick Allan
10 Rhoades.

11 Would you, please, stand up?

12 He is represented by Mr. James
13 Stafford and Ms. Deborah Kaiser. State is
14 represented by Assistant District Attorney Ms.
15 Carol Davies.

16 Is there anybody on this panel who
17 recognizes any of these participants? Anybody
18 not been able to see?

19 Mr. Rhoades, could you kind of stand
20 around?

21 Now is there anybody who recognizes
22 any of these participants? It's not a
23 disqualification. The other side is simply
24 entitled to know if you know any of these people
25 from your employment, neighborhood or anything

1 like that.

2 As I said earlier, this is a capital
3 murder case. We go about selecting a jury in a
4 different manner for those of you who have been
5 down here on criminal jury selection. The
6 defense is entitled to individual voir dire of
7 the prospective jurors. Each one of you can be
8 talked to individually. We do a little bit of
9 hybrid in this court when we are in the process
10 of selecting a jury in a capital case because we
11 give general voir dire. I am going to give a
12 general introduction as to what we are doing,
13 then let each side speak to you. It may be a
14 little bit lengthy from your standpoint, sitting
15 out here in those chairs. I will try to give
16 you a break in a little while. At the end of
17 that time, as I said earlier, we are going to
18 excuse you from the room, these folks are going
19 to get together, and a decision will be made on
20 who is going to be brought back and who is going
21 to be released. During the last hour, hour and
22 a half, they have had an opportunity to glance
23 over those long form questionnaires as well as
24 the short forms, and they will be able to see,
25 during the course of what we are doing this

1 afternoon, your general reaction, your thoughts,
2 your questions about some of the things we are
3 going to be putting to you. At the end of the
4 day, some of you will be released, some of you
5 will be given a morning or afternoon session
6 later this week to come back in here for
7 individual questions. At that time, we actually
8 put you on the witness stand, I speak to you,
9 then each side gets to talk to you for a little
10 while. Sometimes it's a very little while, ten
11 or fifteen minutes; sometimes it's up to two
12 hours, depending on how interested usually they
13 are in and what kind of answers you are making
14 to their questions. Please do not answer
15 anything except absolutely honestly. There is
16 no right or wrong answers to what we are putting
17 to you. The correct response is the honest
18 response. Don't attempt to mislead us. Don't
19 attempt to tell us what you think we want to
20 hear. Don't attempt to answer questions in such
21 a way that you think you will be excluded from
22 serving on this jury. Don't answer in a way
23 such as you think would be a manner in which you
24 would be included on this jury. Just answer us
25 as honestly as you possibly can. We will take

1 care of the rest of it.

2 I know that you have all been
3 qualified technically when you were across the
4 street. I now have a question for all of you.
5 I am going to be asking in a moment if there is
6 any reason why any of you could not sit as a
7 juror in this case. I am not talking about any
8 questions that may have been on this
9 questionnaire. What I am talking about is at
10 the time this case is scheduled and for the
11 length of time it's scheduled. We are going to
12 begin testimony in this case on September 28th,
13 a Monday. We should have a jury selected well
14 before that date, but for scheduling of
15 witnesses and that kind of thing we have to go
16 ahead and get a date we are going to start
17 testimony in the case. We know full well it's
18 going to take us quite some time to get a jury.
19 We have been at this for over three weeks now.
20 On Monday, the 28th, we'll begin about ten a.m.
21 While I might think that this is going to take
22 about a week to try, from experience I know that
23 I should not limit it to that, and I am going to
24 ask each of you who is selected to serve on this
25 jury to go ahead and tell your employers about

1 it, that kind of thing and mark out as much as
2 two weeks, block out as much as two weeks
3 beginning September 28th for service on this
4 jury. Having heard that, I am now asking if
5 there is anybody who has a problem, any kind of
6 thing that is specific that you need to bring to
7 my attention why you could not sit as a juror
8 for as much as two weeks beginning September
9 28th. I am not asking if you are
10 self-employed. I am not asking if being down
11 here is a financial hardship. I am asking the
12 following kind of things. Are you on dialysis?
13 Do you have surgery scheduled on Friday, before
14 the 28th of September? You have a son or
15 daughter getting married in California on
16 September 29th and you would like to be
17 present? Have you got pre-paid, nonrefundable
18 plane tickets for that once in a lifetime trip
19 for Paris that leaves on September 28th, that
20 morning? Those are the kinds of things I am
21 asking. Is there any reason like that why you
22 could not sit as a juror beginning September
23 28th? By a show of hands, anyone? I was about
24 to assume by your silence that nobody had any
25 problem. Show of hands is for number seven and

1 number fifteen. All right. Sir, could you
2 come up, please?

3 This is juror number seven, Mr. Paul
4 Byrd.

5 What is it that you need to tell us?

6 THE PROSPECTIVE JUROR: As of that
7 time, I will be enrolled at the University of
8 Houston school.

9 THE COURT: Starting what date?

10 THE PROSPECTIVE JUROR: This will be
11 starting August 24th.

12 THE COURT: Have you been enrolled?

13 THE PROSPECTIVE JUROR: Yes.

14 THE COURT: What is your
15 classification?

16 THE PROSPECTIVE JUROR: I am a
17 junior.

18 THE COURT: What are you studying?

19 THE PROSPECTIVE JUROR: Computer
20 science.

21 THE COURT: Are you registered?

22 THE PROSPECTIVE JUROR: Yes, sir. I
23 registered in the spring of this year.

24 THE COURT: How many hours are you
25 taking?

1 THE PROSPECTIVE JUROR: I am taking
2 six. I am not full time.

3 THE COURT: You are taking six hours.
4 When do classes being?

5 THE PROSPECTIVE JUROR: They are
6 scheduled for eleven until around one o'clock.

7 THE COURT: Okay. Y'all have any
8 questions?

9 MR. STAFFORD: No.

10 THE COURT: Just have a seat.

11 THE COURT: Ms. Allen.

12 This is number fifteen, Ms. Leaneer,
13 last name Allen. What did you need?

14 THE PROSPECTIVE JUROR: I take
15 medication and I have blood thinner. I can't
16 sit still for a period of time. Too, my sister
17 is coming down from Dallas. She's an M. D.
18 Anderson patient, and she lives with me when
19 she's here, and I take her back and forth.

20 THE COURT: She comes down for
21 treatment?

22 THE PROSPECTIVE JUROR: Yes.

23 THE COURT: And when is she coming
24 down?

25 THE PROSPECTIVE JUROR: Well, she's

1 scheduled the first of September, but usually
2 when she comes, when I say first, it may be
3 first or second week and, she's here for six
4 months.

5 THE COURT: How often does she come?

6 THE PROSPECTIVE JUROR: She just went
7 back home. She's coming now for four months.

8 THE COURT: Is it daily?

9 THE PROSPECTIVE JUROR: Yeah, when she
10 comes down, she goes every day.

11 THE COURT: Is this radiation?

12 THE PROSPECTIVE JUROR: This is
13 radiation. Chemo.

14 THE COURT: Do you want to ask any
15 questions?

16 MR. STAFFORD: No.

17 MS. DAVIES: No.

18 THE COURT: We will ask you some
19 questions later on. Just have a seat.

20 THE COURT: This is number one, Ms.
21 Rebecca David.

22 THE PROSPECTIVE JUROR: I have a trip
23 coming up on October 21.

24 THE COURT: No problem.

25 Anybody else? Just as we did during

1 that question, a lot of times I am going to have
2 to assume by your silence what your answers
3 are. If you need to speak up, you need to
4 respond, don't understand something, you want us
5 to clarify something, raise your hand. Same
6 goes when these people are talking to you. Now,
7 occasionally they may ask you a question --
8 usually doesn't happen when you are on the
9 panel, but on the individual questioning
10 sometimes they will ask a question that you
11 think the answer to which is embarrassing or is
12 simply too personal to share with other people,
13 especially twenty-one other strangers. If that
14 occurs while they are talking to you, raise your
15 hands, and we will attempt to talk about it
16 outside the presence of everybody else like we
17 did with these last two or three questions
18 here.

19 By a show of hands, how many have ever
20 served on a criminal jury in the past?
21 Remarkable. Only two. Has anybody here ever
22 served on a Grand Jury before? No one. How
23 many people have been called and gone through
24 the jury selection process in a criminal case
25 and not served? Not very many. So a lot of

1 what we are going to be talking about is going
2 to be new to you.

3 The general procedure we are going to
4 go through, once we give you the days and times
5 you come back in here, as I said before, we each
6 talk to you for quite sometime, and before you
7 leave at that session we will tell you whether
8 or not you have been selected to serve. If you
9 are selected to serve on the jury, we go ahead
10 and swear you in at that time and give you some
11 additional instructions and tell you exactly
12 when to be back here on the 28th and where to
13 report to.

14 When you come back in here on
15 September 28th, if you are selected to serve on
16 this jury, the defendant will be arraigned in
17 your presence, the indictment having been read
18 to you, and we will begin testimony in the
19 case. The State goes first. The State will go
20 first when they are talking to you in this jury
21 selection process; they will go first when they
22 are presenting witnesses; they will go first and
23 last when they argue the case to you because
24 they have the burden of proof in a criminal
25 case. State calls witnesses to the stand. At

1 some point, the State rests. Once the State
2 rests, the defense has the opportunity to go
3 forward. They don't have to go forward if they
4 don't want to. They don't have to call any
5 witnesses to the stand. They don't have to call
6 the defendant to the stand. The State can not
7 call the defendant to the witness stand. Why do
8 they do that? For a number of reasons. They
9 may feel, by the time the State has rested,
10 after discussing the case among themselves, the
11 State hasn't met their burden of proof. They
12 may feel the State has not proved the
13 defendant's guilt beyond a reasonable doubt and
14 rest right behind the State. They may well be
15 able to put forward whatever kind of defense
16 they want to simply by cross examining the
17 witnesses already called by the State. You
18 can't speculate on why they are doing that kind
19 of thing. If the defendant does not take the
20 stand and testify in his own behalf, you cannot
21 use that as any evidence of guilt whatsoever.
22 I know full well that many of you would say if
23 you were ever charged with a criminal offense
24 you would want to get on the stand and tell
25 everything you knew. Maybe you would and maybe

1 you wouldn't. There are many legitimate reasons
2 why individuals who are charged with offenses
3 don't get on the stand and testify in their own
4 behalf. It's a fifth amendment privilege
5 accorded all of us. We have many defendants
6 these days who have severe accents and don't
7 take the stand. We have many defendants who
8 because of the stress of the situation appear
9 for all the world like they are telling a lie
10 when in fact they are telling the truth. You
11 can't speculate on that kind of information.
12 The burden of proof is on this side of the
13 table. Their burden is to prove the defendant's
14 guilt beyond a reasonable doubt. It's up to
15 them to prove it. Nobody else. This side
16 doesn't have to go forward. At some point, the
17 defense will rest, either having called
18 witnesses or not having called any witnesses.
19 At that point, there may be rebuttal testimony
20 from either side. Usually doesn't take very
21 long. After that, both sides rest and close and
22 I prepare the Court's Charge. That is a
23 multi-page, typewritten instrument which is
24 going to contain all the law and all the
25 definitions you need in this case when you go

1 back to deliberate the case. Both sides will
2 argue the case to you. The State being able to
3 go first and last. You go back to deliberate.
4 The jury returns a verdict in open court, guilty
5 or not guilty. We are going to call that the
6 guilt phase of the trial, whether or not you
7 find a defendant guilty of an offense. If a
8 defendant is found guilty, there is a second
9 stage of trial. We call it a bifurcated trial.
10 Two stages. The first stage, guilt stage, if
11 the defendant is found guilty, you go to the
12 second stage. That is the penalty stage. At
13 that time you may hear additional evidence.
14 Each side has the opportunity to call witnesses
15 and to produce additional evidence. That is
16 normally the stage where you hear evidence of a
17 defendant's background, his reputation, of prior
18 bad acts, if any, of a previous record of
19 criminal convictions, if any exist, that kind of
20 thing. The case is argued to you, after I
21 prepare another charge, you go back and
22 deliberate in this second stage of the trial.
23 That information you receive in the second stage
24 of trial is usually the kind of information most
25 jurors would like to have available when they

1 are making a determination as to what the
2 appropriate punishment should be in any criminal
3 case, capital case or otherwise. Jury returns a
4 verdict in open court. That is basically the
5 way we are going to proceed in the trial.

6 Let's talk about witnesses. I have no
7 idea exactly what is going to go on in this
8 trial. We are not going to permit anybody in
9 here to tell you what they anticipate the facts
10 are going to be.

11 I am going to read to you from the
12 indictment in this case. The indictment, by the
13 way, is no evidence of guilt whatever in a
14 criminal trial. No one here has ever appeared
15 on a Grand Jury, but the Grand Jury has a very
16 different function from that of a jury who will
17 be sworn in to hear this case. The Grand Jury
18 is not determining issues of guilt. The Grand
19 Jury is only deciding that some reason exists
20 for a fact finder, either a court or a jury, to
21 make a determination as to guilt. Usually in a
22 Grand Jury setting, one person appears before
23 the Grand Jury. That is usually a prosecutor
24 who gives a shorthand rendition of what that
25 person thinks the facts are in the case. Based

1 on hearing that from usually only one source,
2 the jury either true bills or no bills the
3 case. Only takes nine people to true bill a
4 case. Basically they are only determining that
5 there is some reason to believe that a jury or a
6 judge should decide the issue of guilt. There
7 is no finding of guilt whatsoever. I would give
8 you an instruction to the effect that the
9 indictment in a case is no evidence of guilt.

10 The indictment alleges that in Harris
11 County, Texas, on or about September 13, 1991,
12 the defendant, Rick Allen Rhoades, did
13 unlawfully intentionally and knowingly cause the
14 death of Bradley Dean Allen by stabbing him with
15 a deadly weapon, namely, a knife, and during the
16 same criminal transaction the defendant did then
17 and there unlawfully intentionally and knowingly
18 cause the death of Charles Allen by stabbing
19 Charles Allen with a deadly weapon, namely, a
20 knife, and by striking Charles Allen with a
21 deadly weapon, namely, a bar.

22 Now, I have given you a couple more
23 items of information. You now know the alleged
24 date of the offense, September 13, 1991. You
25 have the names of two victims, Bradley Dean

1 Allen and Charles Allen. I am going to give
2 you a little bit more information. It's my
3 understanding that the alleged offense occurred
4 September 13, 1991, on Keith Street, K-e-i-t-h,
5 in Pasadena. And the two Allen gentlemen are
6 brothers.

7 Is there anybody here on this panel
8 who lives in Pasadena? Anybody who lives in
9 South Houston? Where do you live?

10 THE PROSPECTIVE JUROR: Clear Lake
11 City.

12 THE COURT: That is way south
13 Houston.

14 Are you Clear Lake City proper?

15 THE PROSPECTIVE JUROR: Right.

16 THE COURT: You, sir?

17 THE PROSPECTIVE JUROR: Ship channel.
18 Southeast.

19 THE COURT: All right. Nobody
20 actually lives in South Houston or Pasadena.

21 Having heard that limited amount of
22 information, is there anybody on this panel who
23 believes you know something about this case?
24 Don't ask me any questions. I want to see a
25 show of hands. Anybody else who thinks you

1 might know anything about this case?

2 Could you please come up?

3 THE COURT: This is prospective juror
4 number twelve, Ms. Janis McGehee. What do you
5 think you know?

6 THE PROSPECTIVE JUROR: I remember
7 reading about it in the paper.

8 THE COURT: Can you tell us anything
9 that you remember?

10 THE PROSPECTIVE JUROR: I remember two
11 guys. They were found in a house at the end of
12 the street. And they were white, in their
13 thirties. And that was about it.

14 THE COURT: See, I know even less than
15 you do if that happens to be the offense. I
16 don't know whether or not any of the information
17 you are giving me is close to the case we have
18 here.

19 Did the names ring a bell? Did you
20 recognize the names?

21 THE PROSPECTIVE JUROR: Yeah, I did.

22 THE COURT: What about what I told you
23 caused you to think that you remember, which
24 part?

25 THE PROSPECTIVE JUROR: Two guys in

1 that area of town that were murdered.

2 THE COURT: Do you remember, by the
3 way, where you might have heard any information
4 or gotten any of the information, if you read
5 it?

6 THE PROSPECTIVE JUROR: I got it in
7 the newspaper and TV.

8 THE COURT: By the way, do you know
9 about when it was that you heard the
10 information?

11 THE PROSPECTIVE JUROR: Right after it
12 happened. If it was September, I don't--

13 THE COURT: Do you remember ever
14 hearing anything else about it?

15 THE PROSPECTIVE JUROR: Yeah, when
16 they, I think when they picked the guy up that
17 they suspected or whatever.

18 THE COURT: Can you tell me anything
19 else?

20 THE PROSPECTIVE JUROR: No.

21 THE COURT: Okay. Based on whatever
22 information it might have been that you heard,
23 do you have any conclusion as to guilt or
24 innocence of the defendant charged in this
25 case?

1 THE PROSPECTIVE JUROR: No.

2 THE COURT: Do you know any of the
3 participants in this case?

4 THE PROSPECTIVE JUROR: No.

5 THE COURT: You did not recognize the
6 defendant when he stood up?

7 THE PROSPECTIVE JUROR: No.

8 THE COURT: From any source?

9 THE PROSPECTIVE JUROR: No.

10 THE COURT: Do you recall ever having
11 heard this case discussed in the interim?

12 THE PROSPECTIVE JUROR: No, just what
13 I read and saw on TV.

14 THE COURT: You haven't reached any
15 conclusion about this case, in either fashion,
16 guilt or innocence?

17 THE PROSPECTIVE JUROR: No.

18 THE COURT: There is nothing about
19 that that would influence your verdict?

20 THE PROSPECTIVE JUROR: I don't think
21 so, no.

22 THE COURT: Do you believe that you
23 will be able to render an impartial verdict on
24 the law and evidence in this case?

25 THE PROSPECTIVE JUROR: I could.

1 THE COURT: Do you have any
2 questions?

3 MS. DAVIES: Nothing.

4 MS. KAISER: Do you remember anything
5 about why they picked this fellow up?

6 THE PROSPECTIVE JUROR: He was a
7 friend of theirs. That is what I remember.

8 MS. KAISER: Okay.

9 THE COURT: You see, I don't know
10 whether or not you are remembering this case or
11 another case.

12 THE PROSPECTIVE JUROR: That's right.
13 I don't either.

14 THE COURT: That is why they all have
15 the advantage of both of us.

16 THE PROSPECTIVE JUROR: I do not know
17 if it's the same one.

18 THE COURT: Have a seat.

19 (Before the panel).

20 THE COURT: Let's go back into the
21 general fashion in which the trial is going to
22 take place. I believe I started talking to you
23 about witnesses before I read some of those
24 names. By the way, while I may have subpoena
25 lists of witnesses filed by either or both

1 sides, that doesn't mean that those are all the
2 people that are going to be called. Frequently
3 the subpoena lists in criminal cases are
4 identical. The State's list is often time
5 identical to the defense witness list, and that
6 is why many times, since the State goes first
7 and gets the first crack at the witnesses, so to
8 speak, a defense can effectively present what
9 they need to by simply cross examining the same
10 people they would have called who were already
11 called first by the State. Every witness who
12 testifies will have been sworn to tell the
13 truth. That doesn't mean that every witness is
14 telling the truth. You get to determine who is
15 the truth teller in the case. You are the fact
16 finders. You determine the credibility of every
17 witness who testifies, including the defendant
18 should he testify in a case. Every witness you
19 see will have been sworn. They will take that
20 oath when they raise their right hand at some
21 point during the trial. Sometimes it takes
22 place in your presence. Sometimes it does not.
23 Sometimes we swear witnesses in when you are out
24 on break, you're at lunch, before you come in in
25 the morning, after you leave in the evening,

1 that kind of thing. I will try to remind you
2 with each witness who takes the stand that that
3 witness has been sworn to tell the truth. But,
4 again, you determine the credibility of a
5 witness. You may believe everything a witness
6 tells you. You may disregard everything a
7 witness tells you. You may choose to believe
8 part of what a witness tells you and disregard
9 the rest of it. That is up to you. You make
10 that determination. But you don't make that
11 determination as to credibility before you have
12 heard the witness testify, which is to say you
13 don't decide that you are going to
14 automatically, for example, believe everything a
15 priest tells you and you are going to
16 automatically disbelieve everything a wrecker
17 driver tells you. You wait until you have heard
18 the testimony and then you make that
19 determination. A frequently asked question in
20 criminal cases is would you believe the
21 testimony of a police officer over that of any
22 other witness simply because he was a police
23 officer and for no other reason. That is
24 asking you to prejudge a person's testimony
25 based on his job or class or whatever it might

1 be. After you have heard a witness testify,
2 based on that witness' background, training,
3 expertise, what that witness was able to observe
4 in the case on trial then you may be able to
5 give that witness greater credibility; but
6 before you have already heard him testify, you
7 don't say I am automatically going to believe
8 what somebody wearing a clerical collar tells me
9 and I am going to automatically disbelieve or
10 believe everything somebody wearing a blue
11 uniform tells me. You wait for the testimony.
12 We want you to keep open minds on every element
13 when you come in here. Just listen to what is
14 going on in the courtroom and make up your own
15 mind as to credibility and everything else.

16 Any questions so far?

17 THE PROSPECTIVE JUROR: If you are on
18 the jury, can you take notes?

19 THE COURT: I am not going to be
20 allowing the jury to take notes. I know there
21 are a couple of courts in this courthouse where
22 they allow that, but we have only one official
23 notetaker in this court, and that is going to be
24 the court reporter. When you go back to
25 deliberate, I will give you instructions that if

1 there is a legitimate question as to some topic
2 that you don't agree on, like six of you on the
3 jury may say I heard that witness say this about
4 that subject, and the other says: No, you
5 didn't hear it right, you can ask for that
6 specific testimony, and we will read that back
7 to you. But I want it verbatim, I don't want an
8 unofficial court reporter, or two or three or
9 however many it is in the jury box writing notes
10 down. Sometimes people write things down
11 incorrectly. I have seen that happen. There is
12 only one official notetaker. If you need
13 testimony, we will give that back to you.

14 Let's talk about some general
15 principles of law. Most of you have to be
16 re-educated because you have seen far too much
17 television in your lifetime, too much television
18 in the form of Perry Mason and Petrochelli and
19 L. A. Law and all the rest of them. Some of the
20 things you are familiar with. Presumption of
21 innocence. A defendant in a criminal case is
22 presumed innocent. As this defendant or any
23 defendant in a criminal case sits in court
24 awaiting trial, he is not a little bit guilty.
25 He is presumed innocent. That is a legal

1 presumption. It can be overcome with legally
2 competent evidence. That is what the State is
3 doing or attempting to do when they put the
4 witnesses on the stand. They are attempting to
5 chip away at that presumption of innocence with
6 every witness they call to the stand so that,
7 hopefully, by the time the State rests, in their
8 view, they will have proven the defendant's
9 guilt beyond a reasonable doubt. That is their
10 burden of proof. Contrary to television, it's
11 not proof beyond all doubt, not proof beyond a
12 shadow of a doubt. For most jurors to have a
13 case proved to their satisfaction beyond all
14 doubt, that juror would have had to have been
15 present and witness the offense occur. If that
16 happened, you would be a witness and you
17 couldn't sit as a juror. We do have some few
18 cases where video cameras are rolling, bank
19 robberies, the occasional convenient store
20 robbery, that kind of thing. Usually the
21 evidence in those cases is so overwhelming, a
22 tape running of a robbery in progress, that
23 those cases never go to trial. So what we are
24 left with are all the rest of the cases, all
25 those in which you listen to witnesses come in

1 and tell you what happened second and third
2 hand. That is the reason the burden of proof on
3 the State is to prove a defendant's guilt beyond
4 a reasonable doubt. For over a hundred years,
5 we existed perfectly well without a definition
6 of what beyond a reasonable doubt means. A few
7 months ago our Court of Criminal Appeals, in
8 their infinite wisdom, gave us a definition, and
9 if either side chooses to read that to you they
10 may do so.

11 Any questions about the presumption of
12 innocence, burden of proof?

13 We have already touched on this
14 failure to testify aspect. A defendant does not
15 have to testify in his own behalf. If he
16 chooses not to testify in his own behalf, you
17 cannot use that as any evidence of guilt
18 whatsoever. He is presumed innocent. The
19 burden of proof is on the State.

20 Let me give you a couple of
21 hypotheticals and make sure y'all understand
22 what we are talking about. Let's assume a
23 defendant is arraigned in the jury's presence.
24 The indictment having been read in open court.
25 The defendant enters a plea of not guilty. The

1 State immediately rests without ever having
2 called any witnesses. The defense rests right
3 behind them. You have heard nothing. You go
4 back to deliberate. Defendant is presumed
5 innocent. State has the burden of proof. All
6 that exists is an indictment, and that is no
7 evidence. You would have to return a verdict of
8 not guilty. Any questions?

9 Second hypothetical. A defendant is
10 arraigned, enters a plea of not guilty, State
11 goes forward by calling witnesses to the stand.
12 At some point, the State rests. Defense rests
13 right behind the State without ever having
14 called any witnesses whatsoever. Charge is read
15 to you, case is argued. You go back to
16 deliberate. In this case, you as an individual
17 juror believe the State had proved the
18 defendant's guilt beyond a reasonable doubt. He
19 didn't testify. The defense called no
20 witnesses. But based on what the State
21 produced, you believed the defendant's guilt had
22 been proved beyond a reasonable doubt. Is there
23 anybody here who could not participate under
24 those circumstances in a verdict of guilty?
25 Sounds like a silly question, but I am asking

1 that for a couple of reasons, and one is because
2 occasionally we will have a prospective juror
3 who believes he or she could sit there and
4 listen to the evidence, go back and deliberate
5 but would never, never be able to vote guilty
6 for personal reasons, philosophical reasons,
7 religious reasons, whatever it might be, even if
8 that juror believed the State had proved the
9 defendant's guilt beyond a reasonable doubt. Is
10 there anybody on this panel of that mind? I am
11 going to assume by your silence that no one is.

12 Third hypothetical. Defendant is
13 arraigned, enters a plea of not guilty, State
14 goes forward, calls witnesses, at some point the
15 State rests. The defense rests right behind the
16 State without ever having called any witnesses.
17 Charge is read to you, case is argued, you go
18 back to deliberate. This time you as an
19 individual, independent juror believe the State
20 had not proved the defendant's guilt beyond a
21 reasonable doubt. He didn't testify. But you
22 don't believe based on what you heard in the
23 courtroom the State had proven his guilt beyond
24 a reasonable doubt. The proper verdict in that
25 case for the individual juror is not guilty.

1 Anybody have any problem with that? Any
2 questions so far? You are all mostly still
3 awake, and occasionally somebody even nods.
4 They are going to make you speak up. I am not
5 going to make you do that because it goes faster
6 this way. They are going to demand to hear your
7 voices after awhile.

8 We have what are called lesser
9 included offenses. If the evidence coming from
10 that witness stand shows that another offense
11 may have been committed, if there is any
12 evidence in the record whatsoever, I put it in
13 the Court's Charge. I basically give the jury
14 options because I am forced to do that. That is
15 what I have to do. If it's in the record, there
16 is testimony on this subject, there is evidence
17 of it, it goes in the Court's Charge. It is
18 not a comment by myself on what I think is the
19 appropriate verdict in a case. The defendant in
20 this case is charged with the offense of capital
21 murder. We know that the lesser included
22 offenses of capital murder under the proper
23 circumstances may include murder, a first degree
24 felony, what we sometimes refer to as simple
25 murder or straight murder. We know that a

1 lesser included offense could be voluntary
2 manslaughter, a second degree felony offense.
3 Third degree felony offense, involuntary
4 manslaughter. Class A misdemeanor offense,
5 negligent homicide, and so on. Just
6 stair-stepping down from the greatest offense
7 down to the lessers -- capital murder, murder,
8 voluntary manslaughter, involuntary
9 manslaughter, negligent homicide. You may well
10 get a charge which says if you don't believe
11 beyond a reasonable doubt that the defendant
12 committed the offense of, for example, capital
13 murder, you are next to consider a lesser
14 included offense, which does, in a fashion, give
15 the jury an option. If you can't agree on one
16 offense, you might be asked to consider the
17 lesser offense. It works the same in all kinds
18 of cases. Aggravated robbery, down to robbery.
19 Perhaps theft or aggravated assault is a lesser
20 included offenses. If you should see a charge
21 on lesser included offenses in this case, you
22 are not to assume that I have made any
23 determination as to what the proper verdict
24 would be. That is still up to the jury. You
25 should anticipate in this case -- I am not

1 telling you anything I don't think these people
2 would tell you -- that at some point in this
3 trial the State is going to be asking you to
4 find the defendant in this case guilty of the
5 offense of capital murder. You should
6 anticipate that at some point in this trial the
7 defense is going to be asking you to either not
8 find the defendant guilty of capital murder and
9 probably consider a lesser included offense or
10 to find him not guilty of any offense
11 whatsoever. You should anticipate that. That
12 is what we are here for. It's a jury trial. If
13 the defendant is found guilty of the offense of
14 capital murder, you should anticipate that at
15 some point the State is going to be asking you
16 to answer questions in a certain way so that the
17 death penalty is assessed. If the defendant is
18 found guilty of the offense of capital murder,
19 you should anticipate that at some point in this
20 trial the defense will be asking you to answer
21 certain questions put to you in such a way that
22 a death penalty does not result. That shouldn't
23 really come as news to you. But the process we
24 go through probably is not going to be very
25 familiar to you. When someone is found guilty

1 of the offense of capital murder, we don't send
2 the jury back to vote for life or death. We
3 have the jury answer certain special issues, two
4 questions that I put to the jury. Based on the
5 answers to those questions, I will either assess
6 life imprisonment or the death penalty as the
7 appropriate punishment in the case.

8 Let's talk about the offenses in
9 general. In terms of murder, when we are
10 talking about that first degree felony offense,
11 I am talking about somebody who intentionally or
12 knowingly causes the death of another
13 individual. When we are talking about capital
14 murder, we are talking about something in
15 addition. We are talking about somebody who
16 intentionally takes another life plus some other
17 aggravating factor. In Texas, we have six
18 categories of offense in which the offense of
19 capital murder can be charged, six murder
20 situations which can be elevated to capital
21 murder status. And when I am talking about a
22 capital murder offense, I am talking about one
23 for which the only possible punishment on
24 conviction is either life or death, not a term
25 of years. By example, some of those lesser

1 included offenses I was talking about,
2 involuntary manslaughter is two to ten year
3 offense. Voluntary manslaughter, two to
4 twenty. Murder, first degree murder, five to 99
5 or life. Very wide -- what did I say? Five to
6 99 or life. In addition a fine not to exceed
7 ten thousand dollars may be assessed. Very wide
8 ranges of punishment. When you get to capital
9 murder, there is only two choices, life or
10 death. Those six ways we have that are set out
11 by statute include when somebody murders a peace
12 officer or a fireman in the lawful discharge of
13 an official duty. You probably heard about
14 those kinds of offenses. It includes the kind
15 where somebody is in a murder for hire scheme,
16 murder for remuneration. Some of those were in
17 the news last year, famous ones locally. When
18 somebody is incarcerated in a penal institution
19 and in fleeing from that institution or
20 attempting to escape, he kills somebody. That
21 can be capital murder. If somebody kills an
22 employee of an institution, penal institution,
23 while he is incarcerated, that is capital
24 murder. The kind of offense that you are most
25 familiar with, the kind you read in the

1 newspaper and you see on television many
2 evenings is where somebody is in the process of
3 committing another felony offense and commits
4 murder. There are five different categories of
5 felonies where that can occur. Kidnapping,
6 robbery, arson, aggravated sexual assault and
7 burglary. Examples, a lady is kidnapped from a
8 parking lot, taken somewhere, raped and
9 murdered. That is a capital murder. The
10 aggravating factor on top of the murder. If a
11 convenient store clerk is killed while somebody
12 is in the process of robbing him, that is a
13 capital murder. The sixth category is the one
14 that we have here. The sixth category is where
15 someone murders more than one person in the same
16 criminal transaction. It can be a number of
17 people -- the Jeffrey Dahmer case in Wisconsin
18 comes to mind. It can be as few as two people.
19 You know from my having read the indictment to
20 you the allegation in this case is that two
21 people were murdered in the same criminal
22 transaction. All those various ways get us to a
23 capital murder offense. And if somebody is
24 convicted of capital murder, only two possible
25 punishments, it's mandatory, either life

1 sentence or the death penalty.

2 Now, I talked about those wide ranges
3 of punishment on the lesser included offenses.
4 Usually it's very easy for people to think of a
5 situation where they would be able to consider
6 the upper end of the range of punishment in the
7 the appropriate set of facts and circumstances.
8 It's often difficult for people to think up a
9 hypothetical situation where the lesser range
10 might be the appropriate penalty. When these
11 folks are talking to you, they are not going to
12 be able to commit you to a set of facts, commit
13 you to what you would do in a certain kind of
14 fact situation, but just one example. Murder
15 case. Somebody commits an act clearly dangerous
16 to human life which results in the death of
17 someone. A situation you may never have thought
18 about is the euthansia case. Husband and wife
19 married fifty years, one spouse is dying some
20 kind of incurable ailment, that spouse is on
21 life-support. Spouse has hours to live. The
22 doctors have been in and said your wife will be
23 dead within twenty-four hours. She knows it.
24 She is in excruciating pain. Because of
25 whatever life-support equipment she is on, she

1 can't have appropriate kind of medication to
2 relieve pain. Doctors leave the room. She
3 pleads with husband to, in effect, pull the
4 plug. He does that. She dies. She may have
5 died ten hours later of natural causes, but what
6 he did caused her death. He committed an act
7 clearly dangerous to human life which resulted
8 in her death. That is the kind of offense in
9 which somebody can be charged with first degree
10 murder.

11 MR. STAFFORD: With all due respect,
12 Your Honor, I do not believe that is murder, for
13 purposes of the record.

14 THE COURT: I understand. And I
15 believe that you are wrong.

16 At any rate, somebody could be charged
17 with that offense, arrested for that offense,
18 indicted for that offense, tried for that
19 offense, convicted of that offense; and if
20 convicted of an offense like that, then the
21 second stage of trial, the penalty stage is
22 where the jury decides the appropriate
23 punishment. And that might be the kind of case
24 where somebody could consider as little as five
25 years in the appropriate case. All I am saying

1 is there are thousands and thousands of
2 different ways in which each one of these
3 offenses can be committed, and that is why it
4 has to be a wide range of punishment and why you
5 have to keep an open mind as to the punishment
6 scheme on these lesser included offenses when we
7 talk about them.

8 Capital murder. Let's suppose the
9 jury returns a verdict of guilty to the offense
10 of capital murder. We don't ask the jury to go
11 back there and vote life or death. First you
12 sit through the penalty stage, which is a
13 shorter version of the trial. Each side has the
14 opportunity to call additional witnesses. You
15 may hear evidence of a defendant's background,
16 character, reputation, prior bad acts, prior
17 criminal convictions, if any. You may hear
18 evidence of mitigating circumstances. Jury goes
19 back to deliberate, but this time they are
20 looking at two questions, two special issues.
21 They are written over here on the board, and
22 these will be turned around to you when you are
23 up here individually. But the first one asks:
24 Do you find from the evidence beyond a
25 reasonable doubt that there is a probability

1 that the defendant would commit criminal acts of
2 violence that would constitute a continuing
3 threat to society. That is asking the jury to
4 make a determination of a defendant's future
5 dangerousness. You have all that information
6 available to you from the first and second stage
7 of trial. I would give you an instruction to
8 the effect that you are to consider the evidence
9 admitted at the guilt or innocence stage as well
10 as all the evidence admitted at the punishment
11 stage, including evidence of a defendant's
12 background or character or the circumstances of
13 the offense that militate for or mitigate
14 against the imposition of the death penalty.

15 We are focusing on the word
16 probability. By probability, in common usage,
17 meaning more likely to occur than not. Do you
18 find from the evidence beyond a reasonable doubt
19 that there is a probability that the defendant
20 would commit criminal acts of violence that
21 would constitute a continuing threat to
22 society.

23 Now, by that term society, that term
24 is undefined. You won't get a definition of the
25 term society in the Court's Charge. It does

1 include the society within the penitentiary. It
2 may include something more than what you have
3 ever considered. We know that many of these
4 concepts you have never considered before. In
5 answering that special issue number one, society
6 includes the society within what we call the
7 Institutional Division of the Texas Department
8 of Criminal Justice, what we use to call TDC or
9 Texas Department of Corrections. So, is there
10 that probability the defendant you have already
11 found guilty of capital murder would commit
12 criminal acts of violence constituting a
13 continuing threat to society. You answer that
14 yes or no. It takes all twelve jurors agreeing
15 unanimously to return a yes answer. Ten or more
16 can agree on a no answer. If number one as to
17 probability is answered no, that is the end of
18 it as far as the jury is concerned, I assess
19 life imprisonment. If number one is answered
20 yes, then we ask the jury to consider issue
21 number two. Special issue number two asks
22 whether, taking into consideration all the
23 evidence, including the circumstances of the
24 offense, the defendant's character and
25 background and the personal moral culpability of

1 the defendant, there is a sufficient mitigating
2 circumstance or circumstances to warrant that a
3 sentence of life imprisonment rather than a
4 death penalty be imposed. I would instruct you
5 that mitigating evidence is evidence that a
6 juror might regard as reducing a defendant's
7 moral blameworthiness. So special issue two is
8 specifically about a mitigating circumstance or
9 mitigating circumstances. Some people would say
10 that special issue number two permits the jury a
11 discretionary grant of mercy basically to say no
12 to the death penalty even though you have
13 already found somebody guilty of capital murder
14 and even though you have already found that
15 person had a probability of committing criminal
16 acts of violence constituting a continuing
17 threat to society. It's important to realize
18 that the answers to these questions can
19 sometimes be yes, sometimes be no, depending on
20 the circumstances you have before you. Every
21 case is different. The circumstances of the
22 offense are different. The kinds of evidence
23 you receive in the punishment stage of trial are
24 going to be different.

25 When I am saying mitigating

1 circumstances, exactly what do I mean? Well,
2 it's not all that clear because, once again, our
3 statutes don't set out for us, they don't
4 identify or limit the aspects of the defendant's
5 character, of his record or the circumstances of
6 the offense that are mitigating. In addition,
7 the law doesn't impose a formula for you to
8 determine how much weight to give a mitigating
9 factor. So you may hear mitigating evidence or
10 you may hear evidence that you decide is not
11 mitigating in that case but in another case
12 might be mitigating. And if you find that the
13 evidence is mitigating, you get to decide how
14 much weight to give to it. So just because
15 there is some mitigating evidence introduced
16 doesn't mean that you have to answer that in
17 such a way that a life sentence is imposed. We
18 know that certain things can be mitigating
19 evidence, like mental retardation, mental
20 illness. We also know that in the proper
21 circumstances and proper case mitigating
22 evidence can include such things as a
23 defendant's good behavior in prison or in jail,
24 can include an exceptionally unhappy or unstable
25 childhood, can include childhood drug abuse,

1 economic deprivation, youth, a defendant's age,
2 illiteracy, drug dependency, voluntary
3 intoxication, opinion testimony of lay witnesses
4 or psychiatric opinion testimony that a
5 defendant would not be a danger in the future.
6 All those kind of things in the proper case
7 might be mitigating evidence. It's up to you to
8 decide, based on what you have heard, whether it
9 is mitigating and how much weight you would give
10 that. You cannot require either side to bring
11 you mitigating evidence. Mitigating evidence
12 may come in in the State's case in chief, it may
13 come in in the form of witnesses called by the
14 defense at that second stage of trial telling
15 you, for example, about some kind of terrible
16 childhood trauma, that kind of thing. I never
17 know until we get into the trial.
18 Unfortunately, you and I are both a little bit
19 in the dark here. We get to hear this evidence
20 for the first time together when testimony
21 begins in this case on September 28th, which is
22 as it should be. The important thing is these
23 answers aren't automatically yes or
24 automatically no. They are going to depend on
25 each case, each set of circumstances and vary

1 from case to case. We certainly don't want
2 anybody who is predisposed to always answer a
3 certain way to insure that a death penalty
4 results or who is predisposed to always answer
5 these questions in such a way that a life
6 sentence results.

7 On that number two issue, all twelve
8 jurors have to agree that the answer is no to
9 return a no answer. Ten or more can agree to a
10 yes answer. If that issue is answered yes, I
11 assess life imprisonment. If all twelve jurors
12 say no, saying basically there is not sufficient
13 mitigating circumstances to warrant a sentence
14 of life imprisonment rather than a death
15 sentence after unanimously agreeing that there
16 is a probability the defendant would commit
17 criminal acts of violence that would constitute
18 a continuing threat to society, I assess the
19 death penalty. Yes/no results in the death
20 penalty. That is the only way it happens.
21 You get to know that in advance. We don't keep
22 you in the dark about that. You are going to
23 know from the outset what I am going to do
24 depending on how you answer those question.

25 Anybody have any questions so far?

Ms. Davies.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 VOIR DIRE EXAMINATION BY THE STATE
2 BY MS. DAVIES:

3 I suspect the one thing I could get
4 all twenty-two of you to agree on right now
5 would be this would be a great time to leave
6 here and go and take a nap. I can tell by the
7 glazed looks. You have been over here all
8 morning and you have had a lot of things thrown
9 at you that you really didn't want to have to
10 hear about anyway. So bear with us.

11 I will introduce myself again. My
12 name is Carol Davies. I am an assistant
13 district attorney. You have probably all heard
14 of your elected district attorney, Johnny
15 Holmes. He has close to two hundred attorneys.
16 It's a big law firm. And all of us are his
17 assistants, and we are assigned to different
18 courts with responsibility for different types
19 of cases, depending on our assignments and our
20 experience. That is why I am here. The judge
21 has already made several references to the State
22 must do this, the State must do that, and as the
23 trial progresses you will continue to hear that
24 phrase. They are talking about me when they
25 talk about the State. I am here with the

1 responsibility to see that the laws of our state
2 are enforced, hopefully to see that justice is
3 done, that appropriate sentences are handed out
4 in these courtrooms, and all these references
5 the State having the burden of proof and so
6 forth are references to me. Rather impersonal,
7 but that is exactly what it means. I always
8 like to mention that because I think it's not
9 nearly as obvious. It's easy to tell who the
10 judge is. Sometimes he is wearing a robe, but
11 at least he's sitting up there and making the
12 rulings as to the law. The court reporter is
13 taking notes, and it's easy to see that the
14 defense attorneys are sitting next to their
15 client, the defendant on trial. And I am over
16 here. Who the heck is she. So, that is why I
17 am here.

18 Some of this is going to be
19 repetitious, I know. Most of you have not had
20 many opportunities, we have very few people who
21 had actually served on juries in this group.
22 And it's a serious case. We are talking about a
23 capital murder. So at the risk of boring you or
24 being repetitious in some respects, it's really
25 important that everybody understands what is

1 going on here. So bear with me and try to
2 answer out, you know, whether you yell out,
3 speak up, raise your hand, stomp your feet, I
4 don't care, just try to let me know whether you
5 agree or disagree. I would appreciate that.

6 This is kind of like an orientation
7 session I guess you would say. What we are
8 trying to do is, I know it doesn't seem like we
9 are saving any time, but that is what we are
10 trying to accomplish because for many of you we
11 are going to talk to you individually, and if we
12 can go over some of these things that are common
13 to all lawsuits, all criminal cases, if we can
14 go over some of them as a group, in the long run
15 it saves some time, we think. For that reason,
16 I am going to save most of my comments and
17 questions of you that relate to the death
18 penalty, that relate to answering those two
19 questions, as the judge has mentioned, at the
20 punishment stage, I am going to save that for
21 when I talk to you individually. So, for the
22 most part, I just want to go over some of the
23 things that are common to many criminal cases
24 and certainly to any murder cases that may be
25 tried as well as capital murder cases.

1 How many of you had the idea when you
2 came down here today that the death penalty was
3 a possible punishment for murder cases in
4 general, for any type of murder case?

5 THE PROSPECTIVE JUROR: I think I
6 did.

7 MS. DAVIES: I see quite a few hands
8 going up. That is pretty typical. You read
9 about things in the newspaper. Half of the time
10 what they tell you is wrong. Any newspaper
11 reporters here? And I apologize if so. It
12 will be part of the information. And it just
13 doesn't give you the whole story. As you know
14 now, that is not the case. The death penalty is
15 only available for one sub group of murder
16 cases. Those are what we refer to as capital
17 murder cases. It has to be an intentional
18 murder plus an aggravating factor. Judge has
19 already mentioned some of them for you. It's
20 the intentional murder committed during the
21 course of a robbery, a burglary, a kidnapping,
22 something of that type, or the intentional
23 murder of a police officer, the murder for hire
24 situation, and it also includes the intentional
25 murder of more than one person during the same

1 criminal transaction. So, for it to be capital
2 murder and for the death penalty to be one of
3 the possible punishments, you've got to have
4 murder plus. That is the highest form of
5 homicide or murder in our legal system here in
6 Texas. The judge has gone over them, and I want
7 to go over that hierarchy again with you
8 quickly. We will start at the top of the
9 ladder, capital murder. That is the
10 intentional murder plus the aggravating factor.
11 Only possible punishments are life or death.
12 That is it. That is when you deal with those
13 two questions. But below that capital murder on
14 the ladder, the list of murder or homicide
15 offenses are a number of other what we refer to
16 as lesser included offenses. Say lesser
17 included offenses, it's kind of like peeling the
18 layers off of an onion, you know, the lesser is
19 always in there. And you keep layering on a
20 little more, a little more to get to the more
21 serious one. Makes me think of those nesting
22 dolls that the kids play with, you know, they
23 are all alike except it gets bigger and bigger.
24 From the murder scheme, it gets a little more
25 serious when you get to the top of the ladder.

1 So, below capital murder is your first degree
2 murder. That is the intentional or knowing
3 taking of a life. Intend to kill somebody but
4 not the additional aggravating factor. First
5 degree, range of punishment, five to 99 years or
6 life. And, by the way, all of these include an
7 optional fine. We know that is the case, but
8 let's focus on the number of years because I
9 think that is the most significant aspect of the
10 punishment. Below that, below that first
11 degree murder is voluntary manslaughter. This
12 is a second degree felony. Punishable by two to
13 twenty years. Voluntary manslaughter is also
14 an intentional or knowing murder, but it is
15 committed under unique circumstances. When
16 someone intentionally kills but they were acting
17 under the influence of sudden passion resulting
18 from an adequate cause. And that language would
19 be explained to a jury by the judge to mean
20 that, in other words, a person is acting under
21 circumstances where they are in such a rage,
22 such an emotional state and they have not had
23 time to coolly reflect to control themselves,
24 and that rage has been caused by the person they
25 kill doing something that a reasonable person

1 would consider an adequate cause. Let me give
2 you an example. You are going to find we talk
3 in terms of hypotheticals in here, and usually
4 they are extreme examples because that is the
5 best way to illustrate something. But an
6 example of voluntary manslaughter would be, say,
7 you come home from work, your twelve-year-old
8 daughter had been home alone, you go in the
9 door, and there she is, she's bleeding,
10 battered, sobbing, she has been cut up, she has
11 been raped, and she sobs to you that Joe who
12 lives down on the corner did this to me. Well,
13 self-defense is not an issue here or defense of
14 your child. It's too late. It has been done.
15 He is gone. You don't have anybody to defend.
16 However, it is easy for most people to see in
17 that example that someone might be so enraged,
18 that instead of reaching for the phone and
19 calling the police, they reach for their gun
20 because they know who it is. He is two doors
21 down at the corner and go shoot him
22 intentionally. It's murder, but the legislature
23 has seen fit that when someone, when a jury
24 believes that they are acting, a person is
25 acting under the influence of sudden passion

1 from an adequate cause in those reasonable
2 circumstances that offense is downgraded to a
3 second degree murder, punishable by two to
4 twenty.

5 You go on down to the next lower rung
6 on the homicide scheme, we have involuntary
7 manslaughter. That is a third degree felony.
8 Third degree felony is punishable by two to ten
9 years. That is the reckless taking of someone's
10 life. Recklessly means you knew there was a
11 risk, you knew you were doing something that
12 might very well cause, endanger someone's life,
13 might result in serious bodily injury or death,
14 didn't intend to kill them, but you knew that
15 the act you were committing was a dangerous
16 one. You disregarded the risk and do it
17 anyway. Example, the kind of thing you read
18 about in the newspapers. This is certainly not
19 the only way that you can have an involuntary
20 manslaughter. But I think it's a typical
21 example is D.W.I. Somebody is driving while
22 intoxicated, they kill somebody. Then, at the
23 very bottom of the ladder is negligent homicide,
24 which isn't even a felony offense. That is a
25 misdemeanor where you should have known there

1 was a risk in the acts you were committing but
2 the person on trial didn't even understand that
3 there was a -- that it was a risk, that they
4 were endangering somebody's life; however, the
5 result of their conduct was someone's death.
6 Okay? So there is an incredibly wide range of
7 punishment there. And all of those lesser
8 offenses are encompassed in that greater offense
9 of capital murder. They just don't have those
10 extra aggravating elements added on.

11 Let's just focus on the felony
12 offenses and set aside capital murder and your
13 death penalty case for the moment. Our concern
14 is to know whether any of you, if you were on a
15 jury in any type of murder case other than
16 capital murder now, and you were confronted with
17 deciding punishment, could you keep an open mind
18 and consider the entire range of punishment?
19 Let's start at the top. Say if you were on a
20 jury considering the first degree murder, five
21 to 99 years or life, is there anyone here who
22 feels like they could never consider sentencing
23 someone to life imprisonment? Anybody here who
24 feels that way? We have people who come in here
25 who feel they shouldn't sit in judgment on

1 somebody and they could never be responsible for
2 that. Yes, sir?

3 THE PROSPECTIVE JUROR: Can I ask a
4 question?

5 MS. DAVIES: You are Mr. Marks?

6 THE PROSPECTIVE JUROR: Yes. What
7 does life mean? Can they get out in three years
8 or four years with life?

9 MS. DAVIES: Well, we always wonder
10 how early on this question is going to come
11 because it comes up every day, and I noticed
12 from looking over the questionnaires that you
13 filled out several of you expressed interested
14 concern about that.

15 Your Honor, would you like to explain
16 that or shall I?

17 THE COURT: I keep hoping that you
18 will just do it without ever talking to me every
19 time.

20 I think we will both do it. I will
21 suffer a little bit, and then I will let you
22 talk to them.

23 You are not to consider how long
24 somebody would have to serve on a sentence
25 imposed. I know full well when you come in here

1 twenty-two different people have twenty-two
2 different ideas exactly how much somebody is
3 going to serve on any sentence imposed. Some of
4 you have better information than others do.
5 Some of you are walking around with a lot of
6 misinformation. Some of you may even have a
7 pretty good idea in certain kinds of cases how
8 quickly somebody can be out. If you are
9 getting your information from most of the news
10 media, it is probably incorrect. At any rate,
11 if you were called upon to assess a term of
12 years in the penitentiary in any case, I would
13 give you an instruction in every criminal case
14 in the punishment stage that you are not to
15 consider parole, you are not to consider how
16 long somebody would actually serve. We know
17 you come in with that information, we know that
18 it's there, but you can't be expected to flush
19 your mind of this information. When you go back
20 to deliberate, however, you are not to consider
21 that in deciding what the appropriate punishment
22 should be. I remind the jurors that parole is
23 within the exclusive jurisdiction of the Board
24 of Pardons and Paroles and the governor of the
25 State of Texas. I don't have any control over

1 it; you don't have any control over it. I would
2 also instruct the jurors that if any other juror
3 starts to mention exactly how long somebody
4 would serve on a sentence imposed it's the duty
5 of the other jurors to stop him at once.

6 Ms. Davies, you can say anything you
7 want to.

8 MS. DAVIES: There is not much to add
9 to that other than, unfortunately, I always like
10 to ask the judge because I hate it when somebody
11 asks me a question and I can't give them a
12 straight out answer. The reason is the judge is
13 going to instruct you that you must not consider
14 that in determining a sentence in this case or
15 in any criminal case.

16 THE PROSPECTIVE JUROR: I don't think
17 I really got an answer.

18 THE COURT: You didn't get a correct
19 answer because I can't tell you. All I can
20 tell you is you can't consider it.

21 THE PROSPECTIVE JUROR: You can't tell
22 me if there is any difference between 99 years
23 and life?

24 THE COURT: I can tell you that.
25 That is usually the second question we get.

1 It's just a matter of how long it takes us to
2 get there. It has to do with when somebody can
3 discharge parole. It's my understanding that
4 you don't ever technically discharge a parole on
5 a life sentence.

6 MS. DAVIES: That's my
7 understanding. There is no distinction in
8 terms of when one becomes eligible for parole.
9 There is only a difference in how long, what
10 portion of one's life you remain on parole after
11 you get out of prison.

12 Now that this has been brought up, the
13 issue of parole, I would like to have
14 everybody's assurance that even though you may
15 disagree with what the Board of Pardons and
16 Paroles is doing at the present time and have
17 concerns about the system, that you recognize
18 that that is something that is not within the
19 jury's or the court's control and that you could
20 follow the judge's instructions and set aside
21 your concern, not let that influence your
22 sentencing in this case if you should be on the
23 jury. Can you do that? Thank you for raising
24 your hand. Okay.

25 Because that is one of the

1 instructions that the judge will give you. It's
2 just something that, you know, if you are
3 wanting to see changes made in that regard, it
4 needs to be through the legislative process or
5 some other process other than through your
6 service as a juror.

7 I think what we were talking about was
8 the range of punishment. Each of your --.

9 THE PROSPECTIVE JUROR: Where does
10 premeditated come in? Is that only first
11 degree?

12 MS. DAVIES: Premeditated doesn't come
13 in at all. We will talk about that a little bit
14 more here in just a few minutes. But, no, we
15 are talking about intentional murder.
16 Premeditated is a term you hear on TV, and it
17 used to be a part of the law but is no longer.

18 So let's go back to the range of
19 punishment for a minute here. My concern is to
20 know whether each of you can keep an open mind
21 as to the full range of punishment. Remember we
22 are not talking about capital murder here right
23 now. We are talking about first degree murder.
24 Five to life. Is there anyone who could never
25 consider sentencing an individual to life

1 imprisonment regardless of the facts? Anyone
2 who feels that way, that they shouldn't sit in
3 judgment of that type? Okay.

4 And then the other end of the spectrum
5 is the low end, as little as five. I heard the
6 judge give you an example about euthanasia, a
7 mercy killing. And, again, usually we use
8 extreme examples to illustrate the point.
9 Murder comes in all kinds of situations. You
10 could have a first degree murder, an intentional
11 murder that was a domestic, an ongoing family
12 feud that finally erupted into violence. It
13 could be a barroom disturbance, stranger meets
14 somebody for the first time. It could be a
15 sniper who kills just one person. Or it can be
16 this other extreme example of someone who is
17 acting, to use the judge's euthanasia or mercy
18 killing example, is acting out of love and
19 doesn't want to see someone suffer, a defendant
20 perhaps who is very elderly and has never been
21 in trouble in his life, that for most people
22 they can see. There is such a difference in the
23 type of fact pattern, that is why we need such a
24 wide range of punishment. So whether we are
25 talking about the minimum range of five years in

1 a first degree murder or the minimum range of
2 two on your second or third degree murder, I
3 just want to be sure that each of you would be
4 able to keep an open mind, wait and hear the
5 facts and decide what punishment was
6 appropriate, whether it's the minimum, maximum
7 or something in between, based on the facts in
8 the case you have heard. Can you do that?

9 Thanks. That makes it so much
10 easier. I appreciate that.

11 You know from the indictment that the
12 judge read to you that this capital murder
13 involves the killing of two individuals. And
14 what I have to prove in proving up this
15 particular capital murder is that there was the
16 intentional, not premeditated but intentional
17 killing of two men, Charles and Bradley Dean
18 Allen. Premeditated, Ms. Holden asked me about
19 premeditated. That was one of the things that I
20 wanted to talk to you about. That is simply not
21 a part of the scheme. Years ago, it was. At
22 this point in our law, I have to prove that it
23 was intentional, that someone intended to kill,
24 but it doesn't matter whether it was planned two
25 days, two minutes or two seconds ahead of time.

1 Does anybody have any disagreement with that?
2 Does that not seem right to you? Mr.
3 Washington?

4 THE PROSPECTIVE JUROR: I have no
5 disagreement with that.

6 MS. DAVIES: Let's talk about that
7 intentional killing. I have to prove that
8 someone intentionally killed and, yet, you
9 already know that this defendant and any
10 defendant in any criminal case has the right to
11 remain silent. He certainly does not have to
12 testify. And I think you have all already
13 indicated that you could respect that
14 constitutional right that we all have to remain
15 silent. Human nature may be that in most
16 situations you are always dying to hear both
17 sides of the story, but this is one place where
18 we have to set aside our natural inclinations
19 and be willing to respect that basic
20 constitutional right of the individual who is on
21 trial. So, can y'all assure me that you can do
22 that? Then we get to, from there, okay, nobody
23 can force this person to testify, and I am
24 supposed to prove what he intended to do. How
25 do I do that?

1 THE PROSPECTIVE JUROR: Evidence.

2 MS. DAVIES: Yeah, evidence, right.

3 From the circumstances. The evidence hopefully
4 that would show -- sometimes you have an
5 eyewitness. We will get into that in a little
6 bit. Sometimes you don't, when you are talking
7 about murder. Sometimes the only person who was
8 there is dead. But you have to look at the
9 circumstances and at the conduct of the
10 individual to decide what they intended to do.
11 Is there anyone who feels like they would have a
12 problem doing that?

13 THE PROSPECTIVE JUROR: I have a
14 question.

15 MS. DAVIES: Mr. Hensley?

16 THE PROSPECTIVE JUROR: Yes. When
17 you are talking about intentional murder, this
18 is something that was planned, you said it could
19 have been planned two weeks, two days or two
20 minutes beforehand.

21 MS. DAVIES: I think I even said two
22 seconds.

23 THE PROSPECTIVE JUROR: But we are not
24 talking about self-defense at all?

25 MS. DAVIES: Not right now, we are

1 not. Self-defense is a concept that I think
2 naturally comes to mind any time you are talking
3 about different types of murder. But, no.

4 THE PROSPECTIVE JUROR: But not in
5 this case?

6 MS. DAVIES: I can't tell you what the
7 evidence will be in this case. We will talk
8 about self-defense here in just a minute. But
9 let's finish up. And remind me if I forget, Mr.
10 Hensley, because I do want to touch on that.

11 To prove intent, I think what I was
12 saying was, even if the defendant gave up his
13 right to remain silent and testified, he might
14 not be totally candid. Like any witness, you
15 might not -- you can believe all, part or none
16 of what somebody says. When somebody has a lot
17 at stake in terms of proving intent, they might
18 not be candid with you. But if somebody does
19 testify, looking at the circumstances and
20 conduct, actually what they did might tell you
21 more about what somebody meant to do. You know,
22 if I push my paper over here and this cup fell
23 off the table, you might not be all that sure
24 that I intended to knock the cup off the table.
25 Hey, you know, she just hit it and it fell

1 off. On the other hand, if you saw me pick up
2 the cup, pull my arm back and hurl it against
3 the wall, you could probably conclude from
4 looking at what I did and how I went about doing
5 it that I intentionally threw the cup against
6 the wall. That would be without my saying
7 anything. You know, if there was a law against
8 breaking this cup that belonged to somebody else
9 or whatever, say, I would have the right to
10 remain silent, I wouldn't have to tell you what
11 I intended to do, but you can look at what I did
12 and how I did it to decide what you believe my
13 intent to be. Does that make sense?

14 THE PROSPECTIVE JUROR: Yeah.

15 MS. DAVIES: As far as how quickly
16 intent can be formed, I think I didn't see
17 anybody disagree with the notion that it could
18 be formed quickly, but let's talk about that for
19 a little bit. Because I do have to prove that
20 there was the intent to kill. And just to try
21 to highlight the fact that it would not have to
22 be premeditated or planned ahead, let's say --
23 anybody drive the freeways in Houston? Make you
24 nervous now and then? Some of the things you
25 read make you wonder whether you should. But,

1 for example, it might be that in Houston, Texas,
2 this kind of hypothetical could occur. You are
3 driving along and certainly without any --
4 nobody knew it was going to happen ahead of
5 time. You cut in front of somebody. It makes
6 them mad. They edge you over to the side of the
7 road, pull a gun and shoot you or your passenger
8 or something. I mean, clearly intended to kill
9 somebody. Pulled a gun, took aim, fired.
10 Intentional murder. But certainly it would be
11 something that was decided on very quickly.
12 They didn't know each other. He didn't know you
13 were going to cut in front of them, and
14 certainly the shooter didn't either. But can
15 you see, that as quickly as that happened, that
16 that could be an intentional murder? Anybody
17 disagree with that? Think to qualify as first
18 degree murder it would have to be something
19 planned out with more thought or planning?
20 Anyone? Okay.

21 THE COURT: Ms. Davies, we are going
22 to take a break.

23 (Recess; after which, the following
24 proceedings were had:)

25 MS. DAVIES: I think we had just about

1 wound up with one area. I wanted to talk to you
2 a little bit about the kinds of witnesses and
3 witnesses in general. I think, when people
4 think about what kind of evidence we have in
5 trials, so often they think of the evidence as
6 physical evidence, bullets, fingerprints,
7 weapons, things you can touch and feel.
8 Evidence also includes testimony. And that is
9 the most typical kind of evidence. Normally we
10 have people come in here, citizens like you and
11 me, who come in and tell under oath what they
12 saw or heard or know about a case. And a part
13 of the jury's job, in fact it is the main part
14 of a jury's job is to decide who is worthy of
15 belief, who is credible, who is not, is part of
16 what they are saying true and maybe part isn't.
17 For example, if during the break you had gone
18 out in front of the building and there was an
19 automobile accident at the intersection and
20 there had been four witnesses, one person
21 standing on each corner seeing that accident
22 from different directions and different
23 perspectives, would it surprise anybody to think
24 that if they came right up here to the courtroom
25 to tell us about it that there might be some

1 discrepancies in the versions that they gave?
2 Would that surprise anybody to think there might
3 be differences in the way they report what they
4 saw? Anybody who would be surprised by that?
5 Several of you are speaking up you certainly
6 wouldn't be surprised. Is there any particular
7 reason why you think there might be
8 differences?

9 THE PROSPECTIVE JUROR: Different
10 angles of vision.

11 MS. DAVIES: Ms. Holden said different
12 angles of vision. Somebody might have had
13 something blocking their view that another
14 person didn't have, or blinked, looked away when
15 the other didn't or had better eyesight. Of
16 course, there can be other differences, too.
17 Some people have better memories or some people
18 are just more articulate, they are better able
19 to come up here and describe for you what they
20 saw. And those are all examples of situations
21 where none of those people would be lying.
22 They might come and tell you as accurately as
23 they are able what they saw. But you as the
24 jury would have to resolve the conflicts, decide
25 which was more accurate. And you could compare

1 what they tell you they saw with the physical
2 evidence of how the cars were, point of impact
3 and so forth to decide which one was the more
4 reliable. Of course, sometimes some people do
5 fabricate or exaggerate or maybe diminish what
6 they saw. And, so, there is other things
7 involved. Did someone have something at stake?
8 I mean, if one of the witnesses happened to be
9 the mother of one of the drivers in that
10 accident, you might say: Well, you know, she
11 might not be quite as reliable. She might have
12 a little bit of a bias. Maybe, maybe not,
13 depending on how she presents herself. That is
14 a part of the jury's job is to resolve the
15 conflicts and decide who is the most
16 believable. Anybody who feels like you could
17 not do that? Anyone at all?

18 Ms. David, is it David or David?

19 THE PROSPECTIVE JUROR: Depends on
20 what language. David. Yeah, I think so. If
21 they all saw the same thing, somehow it would
22 all tie up, so I would say if one person was
23 driving and ran over another person, yes, there
24 might be different angles, but they all have to
25 tie up somehow.

1 MS. DAVIES: You are right. Do you
2 feel like you could resolve the discrepancies?

3 THE PROSPECTIVE JUROR: I don't know.
4 It depends. Some might be lying. But I can't
5 see a problem with everybody not agreeing on
6 certain things but they all have to tie up that
7 they saw the same thing at the same time.

8 MS. DAVIES: One may be lying. That
9 would be a part of the jury's job is to decide
10 which one of those people is worthy of belief
11 and which isn't. So could you look at that type
12 of evidence and make that kind of decision?

13 THE PROSPECTIVE JUROR: I think so.

14 MS. DAVIES: Okay. Sometimes we don't
15 have that kind of problem because there is only
16 one witness. And we can have a situation
17 where -- and you still have to decide whether
18 that witness is reliable and credible, worthy of
19 belief. But the law would permit me to ask a
20 jury to find someone guilty based on the
21 testimony of just one witness, assuming, of
22 course, you would have to believe that witness
23 beyond a reasonable doubt and they would have
24 the information to substantiate guilt. We are
25 talking about capital murder. We are talking

1 about the possibility of a death penalty. Is
2 there anyone who has the reaction to that notion
3 of basing a conviction on just one witness that,
4 no way, you would have to have more than that?
5 Anyone who feels that they could not or would
6 not want to convict based on the testimony of
7 just one witness? Anyone?

8 THE PROSPECTIVE JUROR: I don't
9 know. What if you have doubts about that
10 witness?

11 MS. DAVIES: Well, she's asking what
12 if you have doubts about that witness. In my
13 question, I assume, I mean, you are going to
14 have to decide that witness is worthy of
15 belief. You have to be convinced beyond a
16 reasonable doubt that that witness is a
17 truth-teller. That certainly you are not going
18 to convict somebody based on one witness you
19 don't believe. But say if there is one
20 witness. Some people feel like that one witness
21 isn't enough. I want to know if anybody feels
22 that way. We are talking about a witness you
23 believe beyond a reasonable doubt. Could you
24 base a conviction for capital murder based on
25 the testimony of just one witness assuming you

1 believe that witness beyond a reasonable doubt?

2 THE PROSPECTIVE JUROR: If I believe
3 the witness.

4 MS. DAVIES: Anybody have a problem
5 with that? Okay.

6 The judge has already touched on that
7 notion of different statuses of witnesses. You
8 know, would you automatically believe a police
9 officer, you know, anybody feel like I am always
10 going to believe everything a police officer
11 says, or the flip, I am never going to believe
12 anything a police officer says? Anybody feels
13 either way? Anybody? Or who is always going to
14 believe what a plumber says or never going to
15 believe what a plumber says, or a doctor? The
16 point is can you keep an open mind and listen to
17 a witness and certainly any, if they bring
18 special background or training that is related
19 to what they are testifying about, it's
20 appropriate to consider that in deciding whether
21 to believe their testimony, but the point is we
22 want to think everybody starts out the same at
23 the same point in the race. They start out
24 equal, you wait and hear about their
25 credentials, hear about what they have to say

1 before you decide whether to believe them or
2 not. Fair enough? Can everybody do that?

3 THE PROSPECTIVE JUROR: Yeah.

4 MS. DAVIES: We are nearly getting
5 through here. A couple of things I want to
6 touch on. Another type of evidence that is
7 possibly a part of any criminal case is a
8 situation where a defendant may not testify. He
9 may exercise his right to remain silent, but
10 there may a statement that he gave to the
11 police. There are several rules of evidence
12 that apply to that that I want to touch on. And
13 if a defendant has given a statement to the
14 police, the rules of evidence say, well, the
15 judge first will make some rulings. There are
16 circumstances when sometime the judge may rule
17 most of that statement comes in but some of it
18 doesn't because maybe it's irrelevant, it's too
19 prejudicial, there is something about some
20 aspect of it that the judge would say the jury
21 can't hear, that that is something only the
22 judge can rule on. In other instances I may,
23 according to the rules of evidence, offer a
24 defendant's statement that he has given to the
25 police, but there may be some parts of it I

1 choose not to offer. May be words, it may be
2 sentences, paragraphs, and the jury would know
3 this. It's not that it would be done without
4 your knowledge. It would be clear from the
5 testimony that certain portions have been left
6 out. Anybody highly offended at the motion I
7 may use that rule of evidence and do such a
8 thing, offer parts but not all of a statement?

9 THE PROSPECTIVE JUROR: I would.

10 MS. DAVIES: Ms. David. Ms. Holden.
11 Anybody else? Ms. Henderson. Anybody else?
12 That bothers you.

13 THE PROSPECTIVE JUROR: Yeah.

14 MS. DAVIES: I think that is a natural
15 reaction, why is she leaving that out, I want to
16 hear all of it.

17 THE PROSPECTIVE JUROR: It wouldn't
18 bother me. If you used part of the statement, I
19 would imagine that the defense attorney would
20 bring it up and offer the entire statement.

21 MS. DAVIES: Well, Mr. Washington has
22 touched on the other part of that same rule of
23 evidence.

24 THE PROSPECTIVE JUROR: I figure how
25 can I judge something if I don't have all the

1 information?

2 MS. DAVIES: This is why I touched on
3 this because I don't know what the defense will
4 decide to do, but I like to be sure people who
5 are sitting on juries understand what is going
6 on. That same rule of evidence that would
7 permit me to offer part of the statement, the
8 second part of that same rule is, if I do that,
9 the defense has the right immediately to offer
10 the rest of it. That is like what is fair is
11 fair. She doesn't have to offer all of it. For
12 whatever her trial strategy is. If the defense
13 wants the rest of it in -- and that is a big if
14 -- if they want the rest of it in, they
15 immediately have the right to offer it. So, the
16 result is nothing is ever hidden from the jury.
17 Now, does it make a difference to you, Ms.
18 Holden, knowing that, I mean, if I would do
19 that, we all know going in the defense gets to
20 show it to you if they want to.

21 THE PROSPECTIVE JUROR: I would be
22 against you because you didn't show it to me?

23 MS. DAVIES: Right.

24 THE PROSPECTIVE JUROR: No, I would
25 weigh everything else along the line.

1 MS. DAVIES: I think for most people
2 it makes a difference.

3 THE PROSPECTIVE JUROR: But I wouldn't
4 like it.

5 MS. DAVIES: If I do that, I know, the
6 defense knows, everybody knows: Hey, it's not
7 like she can hide anything from us. She is not
8 trying to do that. It's just a matter of trial
9 strategy, that, hey, if the defense wants that
10 part of the statement in, let them do that, and
11 the law permits them to do so.

12 Ms. David, how about you? Would you
13 hold it against me if I utilize that?

14 THE PROSPECTIVE JUROR: I would just
15 say if you left something out I would feel like
16 I was tricked and not told the whole truth from
17 either side.

18 MS. DAVIES: You would feel like you
19 were tricked even though you know--

20 MS. DAVID: Half a truth is like a lie
21 to me. It's either I am told everything or I am
22 told nothing.

23 MS. DAVIES: Even knowing that that
24 rule of evidence--

25 THE PROSPECTIVE JUROR: It doesn't

1 matter.

2 MS. DAVIES: -- provides that -- you
3 are not going to hear half of it.

4 THE PROSPECTIVE JUROR: They may not
5 offer the other half, I don't know. Is it a
6 sure thing? If it is, then why won't you say it
7 if they are going to come up and say right
8 away? You say it's a strategy. Strategy of
9 what?

10 MS. DAVIES: There are so many
11 different kinds of fact situations.

12 MS. DAVID: I would have a problem. I
13 would have a problem.

14 MS. DAVIES: There can be a situation,
15 to give you an example of strategy, say if there
16 is something in that statement that, I mean, I
17 just think if they want that in let them put it
18 in. For instance, this is an absurd example,
19 but we can't talk about the facts of this case
20 or what might be the case. But say I have got
21 witnesses that say: Oh, I heard the shot at
22 twelve noon, called the police, the police say I
23 arrived at ten minutes after twelve and there
24 was the body, you know, took us ten minutes to
25 get there. And in a defendant's statement he

1 says: Well, I shot this person at midnight. It
2 didn't happen at midnight. It happened at
3 noon. Why would I offer that part of his
4 statement that, you know, it's clearly wrong
5 based on the rest of the evidence.

6 THE PROSPECTIVE JUROR: What
7 difference would it make?

8 THE PROSPECTIVE JUROR: She's
9 interested in pointing to the fact that the
10 person did admit that they committed the crime,
11 they shot the person, regardless of whether it
12 was at twelve noon or twelve midnight.

13 THE PROSPECTIVE JUROR: What
14 difference would it make? Why would she not say
15 whether it was noon?

16 MS. DAVIES: I would be offering
17 evidence of what time it was. You know, I would
18 have, in this hypothetical, all of the evidence
19 points to this happened at a certain time of
20 day. I mean, this is an absurd example. Who
21 knows why it might be important? But we all
22 know that if the defense thinks it's important
23 that he said it happened at midnight, you hear
24 it. Nothing is hidden from you. It's not
25 secret. I mean, I have to tell them

1 everything. They know it. You would know
2 it. It's just like these are the way the rules
3 of evidence work. She does A, they can do B.
4 So, my concern is just to know would you hold it
5 against me if I did that?

6 THE PROSPECTIVE JUROR: No, but I
7 wouldn't like it.

8 MS. DAVIES: Okay.

9 And, Ms. David, you are telling me
10 that you would hold it against me?

11 THE PROSPECTIVE JUROR: Against you or
12 against them. I am going to say whoever is
13 better hiding is the one who is going to get the
14 defendant guilty or not guilty. I mean, it's a
15 matter of convincing. So if you are better in
16 doing your own thing than they are, then we know
17 the result and vice versa.

18 MS. DAVIES: Okay. We will talk
19 about it some more.

20 There was another hand back there.
21 Who else was it that raised their hand? Ms.
22 Henderson?

23 THE PROSPECTIVE JUROR: If you left
24 something out, I would feel like you were trying
25 to sway us your way.

1 MS. DAVIES: Oh, sure, I am. That is
2 what this is all about. In terms of the
3 presentation of the case, I mean, of course, I
4 am going to be trying to persuade you, just as
5 the defense is going to be trying to persuade
6 you. We are on different sides here, you will
7 find out. I mean, we are friendly between
8 breaks, we work together. Hey, during this
9 trial we are on different sides. We are going
10 for different things here. Absolutely. But the
11 point of all this, and because we are, we have
12 to each of us have a strategy on how to develop
13 the evidence. The rules of evidence are going
14 to make sure nothing is hidden from you. You
15 are going to get to hear it all. That is the
16 point of this. I like to be sure jurors
17 understand that because if they don't know how
18 that rule of evidence works they might think I
19 could hide something from them under those
20 circumstances. And that is not the case. That
21 is not the case. Would you hold it against me,
22 Ms. Henderson, if I used that rule?

23 THE PROSPECTIVE JUROR: I just know
24 now that if I were a juror I wouldn't know you
25 wouldn't be telling anything that you didn't

1 want me to hear. You wouldn't be presenting
2 anything.

3 MS. DAVIES: Well, see, discovery in
4 criminal cases requires that -- it's not like on
5 the civil side, where everybody has to tell
6 everything they know. If any of you have ever
7 been involved in civil litigation, the discovery
8 goes on and on. It's not the same way over
9 here. Over here, it's just a one-way street. I
10 have to tell them everything I have.

11 MR. STAFFORD: That's not true, Judge.
12 She only has to tell what the Supreme Court has
13 told her to tell. That doesn't mean
14 everything.

15 MS. DAVIES: I apologize. Let me
16 reword that. I don't have to tell them
17 everything, but I do, I am under professional
18 and ethical requirements as well as rulings of
19 the court to reveal. And certainly -- this
20 example -- any statement a defendant has made,
21 they know all about it. Anything that points to
22 his innocence or mitigation, if I have
23 information of that kind, I must tell them about
24 it. Y'all don't want to sit here all afternoon
25 to go over every detail of types of evidence I

1 must tell them about, but I assure you this is
2 not something that, you know, they don't have to
3 tell me anything about their case. Nothing.
4 But the law does require and certainly anything
5 that would point to innocence or mitigation, if
6 I am in possession of that kind of information,
7 I must tell them. And this would be an
8 example. Any statement they give. It's not
9 like I have a secret and I get to hide it from
10 the defense or from the jury. Okay.

11 Let's go onto something else. We will
12 come back to that later. Another type of legal
13 issue that is related to a defendant's statement
14 is the issue of whether a statement was given
15 voluntarily. It's kind of a legal question.
16 For the most part, the judge decides legal
17 questions and the jury decides questions of
18 fact, like who is believable, what happened
19 there. But this is kind of a unique situation.
20 Anytime a defendant has given a statement and
21 it's offered into evidence, it is quite common
22 that the judge will tell the jury, when they are
23 reaching their verdict, that they have the
24 responsibility, each of them individually, of
25 deciding in their own mind whether that was a

1 voluntary statement. And the judge will tell
2 you that if you are not convinced that it was
3 voluntarily given you must disregard the
4 evidence. Are you hearing what that means? You
5 hear the evidence; you read it; you hear it; you
6 have heard a statement that a defendant gives;
7 and, yet, you would be given the opportunity to
8 decide whether it was voluntary. And if you
9 were not convinced it was voluntary, you must
10 consciously disregard that statement. You can't
11 forget it. Nobody has an erase button on their
12 brain. It's like unringing the bell. You are
13 not going to forget it, but you would go through
14 the mental exercise of disregarding it. In
15 other words, don't consider it as evidence.
16 Just look to the other evidence.

17 Now, on the issue of whether the
18 statement is voluntary, you know, what is the
19 reason for this? I mean, it is another one of
20 those protections for the defendant to be sure
21 that he is not browbeaten, coerced into giving a
22 statement. So one issue of voluntariness would
23 be a pretty obvious, more physical thing. You
24 know, if you heard testimony from a police
25 officer -- and again this is a bizarre, extreme

1 example -- but he described how he starved and
2 tortured a prisoner for days before he got the
3 statement, probably pretty good bet you would
4 decide that was not voluntary. On the other
5 hand, voluntariness, also, the judge would give
6 you a list of certain requirements that the
7 police officers must follow. These are required
8 by the constitution and specifically required by
9 our Texas statute. Anybody heard of the term
10 Miranda warnings? You have seen this on TV.
11 Whether you heard Miranda warnings or not, it's
12 the warnings the police have got to give. You
13 have the right to an attorney. You have the
14 right to remain silent, et cetera. There is a
15 list of those warnings set out in our law now
16 that very specifically police officers know they
17 must do that. And, so, if you have a statement
18 and it's clear from the evidence that they
19 didn't do what the law requires, one of those
20 warnings was left out, the judge will tell you
21 then you disregard that statement because it's
22 not voluntary. As I said, you are not going to
23 forget it, but it's a matter of mental
24 self-discipline; a mental exercise of deciding I
25 will not consider that as evidence because I am

1 not convinced it's voluntary. And you would
2 have to throw it out and look at the other
3 evidence, the remaining evidence to determine
4 whether you are convinced that beyond a
5 reasonable doubt that the person is guilty of
6 the crime. Can each of you assure me that you
7 would follow that instruction from the judge as
8 difficult as it may be? I mean, difficult, just
9 the concept of, you know you can't forget it but
10 you know you are going to have to set it aside.

11 THE PROSPECTIVE JUROR: You have to
12 un-remember.

13 MS. DAVIES: Good. Un-remember. And
14 you can't do that, I mean, you can't forget, you
15 are going to know, so you are going to know
16 exactly what you are doing, but it's a matter of
17 tossing out the evidence, just like in other
18 circumstances you have read about where a judge
19 throws out evidence, decides it's not
20 admissible. This would be each individual juror
21 making that decision because one juror could
22 hear that evidence and think it was voluntary
23 and consider it, another juror would say: Well,
24 I don't think it was voluntary, I am not going
25 to consider that, but based on the other

1 evidence I am still convinced beyond a
2 reasonable doubt he is guilty. See? Okay.
3 Now here comes the hard part, the next step is
4 the really tough one. When you are confronted
5 with that situation where you have heard that
6 statement, it's a confession. I usually call it
7 a statement because a statement doesn't always
8 admit guilt. Sometimes it does; sometimes it
9 doesn't. But you have heard that statement and
10 you are convinced it was not voluntary for
11 whatever reason. For purposes of our
12 hypothetical, let's just assume the police
13 forgot to give one of those warnings the law
14 requires. It's obvious that they didn't give
15 the warnings. You would have to conclude it's
16 not voluntary, so you follow the judge's
17 instructions, you disregard the statement, throw
18 out that evidence, and now you look at the
19 remaining evidence. There is nothing there.
20 Sure not enough to base a conviction on. So
21 you are left with this very difficult situation
22 of not having evidence to convince you of guilt
23 after you have decided you must disregard
24 something that admits guilt. Not easy. This is
25 a matter of self-discipline and being able to go

1 through that mental exercise and live with
2 that. The judge will instruct you exactly what
3 you have to do if you are confronted with that
4 kind of situation where you are convinced, and
5 it would be your individual decision, if you are
6 convinced that was, or I should put it the other
7 way, if you are not convinced it was a voluntary
8 statement. Can each of you do that?

9 THE PROSPECTIVE JUROR: Just because
10 they weren't read that, we have to assume it was
11 involuntary?

12 MS. DAVIES: Well, that can be one
13 way. You know, it could be any kind of
14 situation; but, yes, in that particular setting,
15 yes, the law requires these warnings must be
16 given. And there is a list of them. The judge
17 will tell you that in the instruction. And if
18 those instructions aren't given.

19 THE PROSPECTIVE JUROR: How do you
20 know if they were given or not?

21 MS. DAVIES: By the evidence you would
22 have heard.

23 THE PROSPECTIVE JUROR: The police is
24 going to say I said it and he is going to say he
25 didn't state my rights.

1 MS. DAVIES: Well, given your example,
2 if a police officer said I did do it and a
3 defendant said he didn't?

4 THE PROSPECTIVE JUROR: Uh-huh.

5 MS. DAVIES: The jury is the one who
6 decides who to believe. If you thought the
7 police officer was telling the truth and the
8 defendant wasn't, then it would not be a problem
9 in terms of whether it's voluntary. Or it could
10 go the other way, depending on who you believe,
11 the credibility of the witnesses. Or it could
12 be a situation where a rookie officer comes in
13 and tells you: God, you know, I didn't have
14 that list with me and I couldn't remember it.
15 I left that fifth one out. You know, whatever
16 the fact situation is. Because we can't know
17 what the facts are in any case. We can't
18 predict, any one of us, what we are going to do
19 in a particular fact situation. That is not
20 what we are trying to pin you down to. We just
21 want the general concepts. Can you see that
22 situations exist out there that under those
23 instructions a jury might be required to do
24 that?

25 THE PROSPECTIVE JUROR: I would have a

1 problem.

2 MS. DAVIES: It would be difficult to
3 do.

4 THE PROSPECTIVE JUROR: To me, yes.

5 THE PROSPECTIVE JUROR: If they
6 admitted they were guilty but they weren't read
7 their rights and there wasn't enough evidence to
8 prove they are guilty even though you feel they
9 are guilty because they said they were, you
10 would have to say that they weren't if there
11 wasn't the evidence.

12 MS. DAVIES: If you were convinced
13 that the statement was not voluntary.

14 THE PROSPECTIVE JUROR: It could have
15 been voluntary, but if they weren't given the
16 rights, then you can't consider it; right?

17 MS. DAVIES: The judge is going to
18 tell you that for a statement to be voluntary,
19 these rights, the defendant must have been
20 advised of these rights. The law requires
21 that.

22 THE PROSPECTIVE JUROR: So even though
23 you felt they were guilty, that they admitted
24 it, but they weren't read, legally you would
25 have to say that they weren't guilty?

1 MS. DAVIES: You would have to be able
2 to follow the judge's instruction, look at the
3 rest of the evidence, and if there was not
4 enough evidence to prove guilt, you would be in
5 the position of having to find somebody not
6 guilty. It's not an easy concept, no. But that
7 is one aspect of the law that the judge would
8 instruct you on. I just want to be sure that
9 each of you would be able to follow that. I
10 mean, it's just like the constitutional right to
11 remain silent. That is not easy for some
12 people, either. But those are the protections
13 that make up our judicial system that we all
14 have to respect because they are rights that
15 each of has.

16 THE PROSPECTIVE JUROR: Everybody
17 knows their rights now; don't they?

18 MS. DAVIES: Well, for the most part,
19 but you might not know the exact list. I mean,
20 Ms. Holden is saying everybody knows their
21 rights. All you have to do is go to a couple of
22 movies or watch TV and you know police officers
23 give those rights. You know, again, I am using
24 an extreme example to illustrate a point because
25 we need to be sure that you can follow the law.

1 And that is the way the judge will explain the
2 law to you. He will probably do a much clearer
3 job of doing it than I have as we are talking
4 about it, but that is the point, to be sure that
5 you can follow that law, as difficult as it may
6 be, if you were confronted with that situation.
7 Okay?

8 One of the other basic constitutional
9 rights is that presumption of innocence. You
10 know, it's like a protective bubble that
11 surrounds the defendant as he sits here right
12 now. Doesn't mean he didn't do it. It means he
13 must be presumed innocent at this point. Only
14 after I have brought that evidence to the
15 courtroom that is sufficient to convince you
16 beyond a reasonable doubt of guilt, then that
17 bubble bursts. But if right now if we ask for a
18 vote, guilty or not guilty, you would have to
19 say not guilty. I mean, that is not going to
20 happen because that is not the way the trial
21 will proceed, but the point is that you would
22 have to say not guilty now because he has that
23 protective bubble of the presumption of
24 innocence surrounding him as he sits here
25 today. Fair enough?

1 Did I hear somebody try to ask a
2 question?

3 Mr. Hensley asked me to talk about
4 self-defense. I probably would have saved that
5 for individual, but I will touch on it since you
6 brought it up. Anything that popped into
7 anybody else's mind that they wanted to ask me
8 questions about?

9 Let's touch on self-defense briefly.
10 I assume that everybody here feels like you have
11 the right to protect yourself, to defend
12 yourself, or even to defend family members or
13 friends or whatever. Am I right? And the law
14 certainly contemplates that, too. You know,
15 self-defense is a concept where you might find
16 that, yes, someone is guilty of murder. I think
17 this is why you asked me, Mr. Hensley. Yes, it
18 was an intentional murder, but they were acting
19 under circumstances that they had the right to
20 defend themselves. And if that is the case,
21 they would be found not guilty. It's like a
22 justification, a defense that would excuse the
23 conduct. But there are firm limitations, legal
24 limitations on that right to defend yourself.
25 You only are entitled to defend yourself when

1 you are acting lawfully, when you are responding
2 to an unlawful use of deadly force. You are
3 limited to use that degree of force that is
4 immediately necessary. In other words, somebody
5 comes after you with a fly swatter, you know, a
6 Uzi is probably excessive force. So the degree
7 of force, is it immediately necessary? Would a
8 reasonable person in the circumstances have
9 retreated instead of using force? So, it
10 probably would make a difference if you were in
11 your own home it would be rare to think that a
12 reasonable person would retreat. You have the
13 right to be there as opposed to if you had gone
14 to your neighbor's house and accosted them,
15 maybe you are the one who should retreat. So
16 the right is there to defend yourself and even
17 to defend another, but under certain
18 limitations. Does that answer your question?
19 Did you have anything more specific in mind?

20 THE PROSPECTIVE JUROR: No.

21 MS. DAVIES: Anybody else have any
22 questions? Mr. Marks, when am I going to sit
23 down and be quiet?

24 THE PROSPECTIVE JUROR: No.

25 MS. DAVIES: It would have been a fair

1 question.

2 THE PROSPECTIVE JUROR: Can
3 circumstantial evidence be in a capital case?

4 MS. DAVIES: I am so glad you asked
5 about that. I forgot to talk about that. We
6 have physical evidence. We have testimonial
7 evidence. We don't always have eyewitnesses,
8 and especially when we are talking about a
9 murder case. Yes, circumstantial evidence can
10 be used in any criminal case. I don't like to
11 call it circumstantial evidence because I think
12 that is a dirty word for a lot of people. I
13 like to call it indirect evidence because it's
14 not an eye-witness thing, what happened, but
15 it's proving the case based on the
16 circumstances. You asked that question. Is it
17 because you were concerned that you feel like
18 circumstantial evidence would be inappropriate
19 or?

20 THE PROSPECTIVE JUROR: No, just a lot
21 of people have trouble with that, I mean, if
22 someone blindfolded six people and shoots one of
23 them, nobody saw him do it, that is
24 circumstantial evidence. At least, that is what
25 I would understand it.

1 MS. DAVIES: You sure don't have an
2 eyewitness. Well, you might have -- to use your
3 hypothetical of circumstantial evidence, say if
4 everybody who was there were blindfolded and
5 they hear a shot, you know, it may be that one
6 of those people would be able to testify that,
7 well, right before the blindfold was put over my
8 eyes I saw one gun in the room. It was a .38.
9 Looked like a .38 to me. And that man, that
10 defendant, had it in his hand. And then they
11 blindfolded me, I didn't see what happened, but
12 I heard one shot. Okay. And then say there is
13 somebody across the street outside -- and I am
14 going to change your hypothetical. This is a
15 building. This happened in a place with no
16 windows and only one door. In other words, no
17 other way to get out. And somebody across the
18 street says I saw this defendant, I heard a
19 shot, I didn't see what happened in there, but I
20 heard a shot, I saw this person run out the one
21 and only opening in that building immediately
22 after the shot was fired, and I called the
23 police. Nobody else went in or out of that
24 building until the police arrived. And the
25 police get there, and there is only evidence of

1 one shot being fired. Maybe they do a test and
2 this man has residue of gunpowder on his hand or
3 whatever. It's all circumstantial. Nobody
4 saw what happened. But, you know, as we are
5 talking here, pretty strong circumstantial case
6 as to who was the shooter. Okay. Indirect
7 evidence.

8 Is there anybody who feels like they
9 could not convict anyone based on circumstantial
10 evidence? Anybody who feels like that that is
11 just out of the question for them? Anyone at
12 all? Just tell me. I mean, fair enough. You
13 are free to feel how you feel about anything.
14 Thanks. I will be quiet now.

15 THE COURT: Mr. Stafford.

16
17 VOIR DIRE EXAMINATION BY THE DEFENSE

18 BY MR. STAFFORD:

19 You mean it's my turn? All right. I
20 am so glad to see so many Democrats here. I
21 know if there were any Republicans you would be
22 at the Astrodome. All right. We thank you for
23 coming. I am not going to talk very long, but
24 there's a few things I want to talk to you about
25 because actually I guess Ms. Davies has kind of

1 told you her role.. And it's true. She and I
2 have been friends. We have been what I call the
3 gladiators in the courtrooms for a couple of
4 years or several years. And I, as she said her
5 role is to see justice is done and the
6 appropriate sentence is handed out, there is no
7 doubt in my mind that the line in the sand in
8 this case has been drawn. She's just a breath
9 away, if you are on this jury, to ask you to
10 give my client the death penalty. I am going
11 to be up front with you as I stand here right
12 now. And I have been doing it for twenty
13 years. I am here trying to save my client's
14 life. And it seems like at times maybe there
15 is no bad intent on anybody's part, is that we
16 have been in trial now or jury selection for the
17 fourth week. What does that mean? That means
18 the people we have talked to for four weeks have
19 a whole group of ideas and thoughts, biases and
20 prejudices. When we talk about bias and
21 prejudice, everybody's defensive mechanisms
22 automatically go up. Because if I probably
23 would ask each one of you do you have any bias
24 or prejudice uniformly probably would say no I
25 do not. But at no time in their history right

1 now as we are in Houston, Texas, does the true
2 issue of bias and prejudice come out because
3 right now we can't pick up a newspaper, we can't
4 see the television without the protesters or
5 what is going on now during the convention.
6 What is that? That is bias and prejudices.
7 Doesn't mean in a negative form. That means you
8 believe so strongly in something that you are
9 willing to get out on the street and carry a
10 thing. So it's basically the same way. We are
11 here trying to select a jury that can be what I
12 consider fair to my side. I want a jury who is
13 going to consider all the facts, all the
14 mitigating evidence before they determine to put
15 my client to death because once you take that
16 oath you are saying something to the court and
17 to the jury is that I can vote for the death
18 penalty. You are certified to take someone's
19 life based upon the law and the evidence.

20 MS. DAVIES: I object to that
21 characterization.

22 THE COURT: Sustained.

23 MR. STAFFORD: On the defense
24 standpoint, the defense is not entitled to a
25 juror who says I could never vote for the death

1 penalty. Under any fact situation, I can't vote
2 for the death penalty. Because basically that
3 person can not consider the full range of
4 punishment. Okay? There are some people who
5 feel so strongly about the death penalty because
6 of their own personal beliefs, maybe based upon
7 what has happened to them, maybe based upon
8 their house being burglarized so many times or
9 their car being taken so many times, that they
10 feel like anybody who has been to prison or does
11 anything else and goes out and commits murder in
12 the process of robbery there is only one just
13 punishment. They may be fair at the guilt or
14 innocence stage, but come punishment time they
15 think there is only one appropriate punishment.
16 It's almost like you as a child being a victim
17 of sexual molestation. You have been a victim
18 for years. How fair of a juror would you be
19 come punishment time if you had to sit on
20 judgment for punishment? My point is those are
21 the kind of feelings, when we bring you back and
22 talk to you, that we want you to tell us about.
23 I think another thing that scares jurors -- and
24 this is where I want to talk to you. We keep
25 saying we want to know whether you can put it

1 out of your mind and follow the law. Can you
2 put it out of your mind and follow the law? I
3 don't want you to believe or think that if you
4 disagree with a particular point of law that you
5 are breaking the law, that you are a bad citizen
6 because you don't agree. Again, we know we have
7 the right to disagree. There have already been
8 several people arrested at the abortion clinics
9 for their various beliefs. So you have the
10 right to agree or disagree. That is my whole
11 point.

12 Now, there are certain things that I
13 think are what we call hot topics. We have
14 already kind of touched on them. Our Honor
15 again will tell you that you cannot consider
16 parole because come punishment time it may be a
17 situation where it's life or death. It will
18 be. That is the only choice you have got. But
19 when we bring you back, if you have strong
20 feelings about early parole, if it would affect
21 your decision and you can't put it aside, we
22 need to know that. Only you know that. I don't
23 know that. I can't look into your mind. I get
24 fifteen strikes. In other words, I can
25 eliminate fifteen people. I imagine y'all wish

1 y'all had a few strikes and you would eliminate
2 the lawyers right now. It's a process of
3 elimination. The State has fifteen. I have
4 fifteen. So basically we don't know. We have
5 got ten or fifteen minutes with you to make a
6 decision. But I know all of us have strong,
7 strong feelings and beliefs and philosophies
8 about certain things. And if you believe in
9 your heart and your soul, and only you know,
10 that it would affect the way you would approach
11 something, then please tell us, whether it's for
12 me, against me or whatever.

13 Now, another area I would like to talk
14 to you about is similar to what Ms. Davies
15 talked to you about on the confession issue.
16 And there is basically what we call some people
17 believe there are technicalities in the law. We
18 lawyers don't talk in technicalities. We
19 believe the law is the law and there is no such
20 thing as legal technicalities, but we know the
21 citizens believe in technicalities. And that
22 the technicality that she touched on
23 basically--.

24 MS. DAVIES: I object to
25 characterizing any aspect of our state's laws as

1 a technicality.

2 THE COURT: Be more specific please,
3 sir.

4 MR. STAFFORD: What some citizens
5 would believe I don't believe is a
6 technicality. As you can gather, Ms. Davies
7 doesn't believe it's a technicality, neither do
8 I, but some citizens believe that the fact that
9 a police officer fails to warn a citizen that he
10 has the right to have a lawyer is what they
11 would consider a legal technicality. In fact,
12 it is not, but some people feel that way. We
13 are talking about legal rights versus what y'all
14 consider in laymen's terms technicalities;
15 okay? Because voluntariness to a lot of lay
16 people means did they abuse it. Did they take
17 an electric prod and prod him and shock him to
18 make him confess. Did they cigarette burn him?
19 They look in those terms. Have been cases where
20 they have taken Coca-Cola, shake it up and
21 sprayed it up your nose. It's remarkable how
22 truthful you get when you have Coca-Cola going
23 up your nose. Those are the areas, when we
24 talk to you individually about, is that once --
25 Our Honor will tell you that if you believe, you

1 may believe in your heart beyond a reasonable
2 doubt that he went in and raped and robbed and
3 killed that lady. You believe it beyond a
4 reasonable doubt. But the only reason you can't
5 consider the confession is because a rookie
6 police officer forgot to give the warning. And
7 if you throw that statement out, that means
8 there is nothing there to convict him, and you
9 know in your heart that he did it. Those are
10 the things you have the right to disagree with
11 if you do. If you don't, if you can follow the
12 law, then you can follow the law. Some people
13 can't. We need to know it.

14 Another thing I want to talk to you
15 about. I think she brought it up about the
16 readings of the warnings, for example. This may
17 be an area that I would like to know more
18 about. You may be in a situation where it's
19 the police officer's testimony versus the
20 defendant's testimony. Police officer says:
21 Yes, I read him the warnings. The defendant
22 says: No, he didn't read me the warning. Some
23 people believe, just because that person is a
24 police officer, I am going to believe his
25 testimony every time. If he said he read the

1 warning, I am going to believe him over the
2 defendant every time in every situation.
3 Basically what you are telling me in that
4 situation I could never convince you that the
5 police officer didn't do what he said. I mean,
6 you have already blocked me out. Nothing wrong
7 with you feeling that way. Some people believe
8 that police officers would not shed the truth or
9 shade the truth I think is the term I am looking
10 for. Some people believe a police officer is
11 just like everybody else. A lot of us have run
12 yellow lights and gotten a ticket for running a
13 red light when you know in your heart it was
14 yellow or almost green. But that is okay.
15 And, so, those are the things that we need to
16 know and we need to talk about.

17 And the confession, as far as
18 introducing things into evidence and not
19 introducing things into evidence, it's I guess
20 what we can say about confessions is basically,
21 or statements, is there are certain things that
22 Our Honor has a right to rule on that you will
23 never know about. There are certain legal
24 things. There are certain things in statements
25 that if they are not relevant, for example, you

1 probably will not hear about them because
2 basically the only reason you are here is to
3 know about the facts of this case, not about
4 what happened two years ago in his early
5 childhood. If he makes some reference to that
6 in his statement, it has no bearing on this case
7 at all. I may feel like it shouldn't be there,
8 or she may feel it shouldn't be there, and the
9 judge would rule on it appropriately, and you
10 would not get that. But also there a rule
11 basically that the statement can be introduced
12 in total. And whatever trial strategy is, I
13 guess the bottom line is you are not supposed to
14 concern yourself about what the State's trial
15 strategy is and what mine is other than we are
16 adversaries and we are definitely trying to
17 prove two different things.

18 Anybody have any questions of me?

19 None. That's great.

20 One other little thing. There was
21 some comment because it always kind of ruffles
22 my feathers about not being a two-way street in
23 discovery. There are certain rules, for
24 example, that if I am raising the defense of
25 insanity I have to give the state notice. There

1 is also the discovery that the State gives the
2 defense is basically what our Supreme Court has
3 stated because if any of y'all are historians of
4 history you realize that one of the first things
5 our founding fathers did was that to keep the
6 government from taking citizens out of their
7 home and throwing them into prison, et cetera,
8 et cetera, that they came up with certain rules
9 and regulations. And one of them is that when
10 the government or the State of Texas points the
11 finger at you and says you committed a crime
12 then the burden of proof is on them to prove
13 that you did what they said you did. They don't
14 require us to produce any evidence. The burden
15 is on them. As a practical matter, I will
16 agree with Ms. Davies, it's not like on the
17 civil side. On the civil side, you have the
18 right to give notice to the police officers, for
19 example, if it's a civil case, you have a right
20 to take their deposition. Defendants do not
21 have the right to depose the police officers.
22 We don't have the right to bring them in before
23 trial under deposition and ask them what they
24 know about the case. We have the right sometime
25 to read their offense report, but if it's only a

1 paragraph long you don't know that much. It's
2 not always what she painted it to be. It's not
3 a two-way street. But there are certain things
4 that the constitution requires. I ask you not
5 to hold that against us.

6 How many of ya'll, as you sit here
7 looking at my client sitting over there, think
8 he is a little bit guilty or he wouldn't be
9 here? Anybody feel that way? Okay. Would you
10 raise your hands again? I won't remember the
11 numbers. Okay. That is something else I want
12 to talk to you about when we talk to you
13 individually. Do you think he is a little bit
14 guilty, how it would affect you later down the
15 road. Can you really and truly presume him to
16 be innocent? And, again, you have the right to
17 believe or not believe anything you want to
18 believe.

19 How many of you wish you hadn't showed
20 up this morning? How many of y'all want to go
21 home? Okay.

22 Talked about early parole.

23 Another thing that concerns me that I
24 want you to also think about because I think we
25 have certain factors in our life that may

1 control us. There are two or three people in
2 here that have had either fathers or friends or
3 actively involved with law enforcement. I think
4 maybe some of the most difficult case of that
5 would be being put on a capital murder trial and
6 coming back with a verdict, for example, on
7 punishment, of life. Do you think that would
8 cause some undue pressure by your family members
9 or loved ones or friends by saying how in the
10 world could you do that? Because often people
11 come to me and say: Stafford, how in the world
12 could you defend these horrible people charged
13 with horrible crimes? Like Ms. Davies has
14 commented, they are presumed to be innocent.
15 And often some of the greatest work that can be
16 done is to make the State of Texas prove they
17 did what they said they did, or in this
18 situation trying to convince you through
19 mitigating evidence that my client doesn't
20 deserve to die for what they say he did. Come
21 to the punishment phase of the trial, for
22 example, we won't talk about this individually
23 now, but there is going to be -- you haven't
24 been able to read the number two special issue
25 that basically talks about mitigating evidence,

1 as to whether there are certain factors that
2 would warrant a life imprisonment based upon the
3 evidence rather than death. There are certain
4 people believe that there are no mitigating
5 factors, for example, they could not consider
6 this, this and this to warrant life. If you
7 took a life, it's eye for eye, tooth for tooth,
8 and that is the only proper punishment. If you
9 feel that way, there is nothing wrong with it.
10 We just need to know about it.

11 I thank you for your time.

12 THE COURT: Ladies and gentlemen, we
13 ask you to step outside the room for a few
14 minutes. Just remain in the hallway when you
15 come back. Do not come back into the room
16 here.

17 (Prospective jurors leave the
18 courtroom)

19 THE COURT: It's my understanding that
20 by agreement of all parties the following
21 prospective jurors on panel number four are
22 being excused: Number one, Ms. Rebecca Lask
23 David; number two, Mr. Valentine Guzman; number
24 three, Mr. Victor James Marks; number four, Mr.
25 Tony Alonzo Washington; number six, Ms. Floria

1 Henderson; number seven, Mr. Paul Anthony Byrd;
2 number 14, Ms. Dale Porter Miller; number
3 fifteen, Ms. Leaneer Allen; number 22, Mr.
4 Christopher E. Heinrich.

5 THE COURT: Is that your agreement,
6 Ms. Davies?

7 MS. DAVIES: Yes, sir.

8 THE COURT: Yours, Mr. Stafford?

9 MR. STAFFORD: Yes.

10 THE COURT: Yours, Mr. Rhoades?

11 THE DEFENDANT: Yes, Your Honor.

12 MR. STAFFORD: Before you bring them
13 in, could I put something on the record? I make
14 a motion to quash the whole panel because of the
15 ineffective -- not ineffective, the wrong
16 hypothet that you gave on pulling the plug. I
17 don't think that is murder. I think it tainted
18 the whole jury panel. I would ask the whole
19 panel be quashed.

20 THE COURT: Certainly depends on the
21 facts as flushed out in a case.

22 MR. STAFFORD: I make a motion to
23 quash the whole panel based on the court giving
24 a bad analogy.

25 THE COURT: Denied.

1 (Panel returns to the courtroom)

2 THE COURT: All right, I am going to
3 call the numbers and names of those folks who
4 are going to be excused for all purposes. This
5 gentleman has the slips you can take with you to
6 your employer or whoever needs to look at them.
7 You do not have to go back to the jury assembly
8 room. You may leave as I call out your name.

9 Number one, Ms. David; number two, Mr.
10 Guzman; number three, Mr. Marks; number four,
11 Mr. Washington; number six, Ms. Henderson;
12 number seven, Mr. Byrd; number fourteen, Ms.
13 Miller; number fifteen, Ms. Allen; number 22,
14 Mr. Heinrich.

15 For those of you left in the pool, we
16 are now going to give you the times and days
17 that you are going to return here. Don't leave.
18 We are just going to pass these out for right
19 here. Ms. Holden will be coming back and Mr.
20 Roberts also at 9:30 tomorrow morning, Tuesday.
21 Tomorrow afternoon at 1:00, Mr. Englund and Ms.
22 Crutch. At two p.m., Ms. Gracey. At 9:30 a.m.
23 on Wednesday Ms. McGehee and Ms. Holiday. At
24 1:00 p.m. on Wednesday, Mr. Hensley and Ms.
25 Quintanilla. At 9:30 a.m. on Thursday, Ms.

1 Alvarado and Mr. Rodriguez. At 1:00 p.m. on
2 Thursday, Ms. Parton and Ms. Wing.

3 Now that you have been given those
4 slips, is there any discrepancy in the day and
5 time I called out and what is written on your
6 slip?

7 All right. You are not to discuss
8 anything we have talked about or anything on the
9 questionnaire with anyone, not spouses, not
10 employers, not with each other. You are going
11 to have to necessarily tell your employer the
12 reason that you have to come back one day this
13 week is because you are a prospective juror on a
14 capital murder case; but, again, don't sit there
15 and listen to anything they want to tell you.
16 Just say it's capital murder case; when I get
17 struck from the case, I will talk to you. If I
18 get put on the jury, I will talk to you about it
19 when it's all over. Don't make any kind of
20 independent investigation, which is to say don't
21 attempt to read any law that you think might
22 apply in the case or in the questioning you
23 might get from the parties involved. Don't
24 attempt to find out which capital murder case we
25 are discussing. The attorneys are being advised

1 not to engage you in conversation. If they see
2 you in the hallway or on the elevator, they may
3 nod that they recognize you but they are not
4 going to engage you in conversation. If anybody
5 attempts to talk to you about the case, bring it
6 to our attention as soon as you see us the next
7 time, me or the bailiff who has you in charge.

8 Do you have any questions?

9 THE PROSPECTIVE JUROR: We are only
10 here for one day?

11 THE COURT: Either the morning or
12 afternoon session, one day. When we complete
13 the examination of you, we are going to tell you
14 right then whether or not you are going to be on
15 the jury coming back September 28th.

16 Any other questions? None? If there
17 is nothing else, you are excused until your
18 appointed times. Tomorrow morning it's Mr.
19 Roberts and Ms. Holden at 9:30.
20
21
22
23
24
25